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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1005

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL., *Petitioners*

v.

THE BOEING COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
I. Introduction	3
II. Background	6
III. NASA's Award to Boeing of the Contract to Furnish Installation Support Services at KSC.	7
IV. Boeing's Recruitment of a Work Force	9
V. Boeing's Takeover of the Operation on April 1, 1971	14
VI. IAMAW and Boeing Join Issue	15
REASONS FOR GRANTING THE WRIT	18
CONCLUSION	32

AUTHORITIES CITED

CASES:

ABC Food Service, 176 NLRB 426	21
Boys Markets v. *Retail Clerks Union*, 398 U.S. 235	25
Dorrance J. Benzchawel, d/b/a Parkwood IGA, 201 NLRB 905	27
Emerald Maintenance, 188 NLRB 876	21
Emerald Maintenance v. *N.L.R.B.*, 464 F.2d 698	27
Fry Roofing Company, 192 NLRB 791	27
Geronimo Service Co., 191 NLRB 450	21
G.T.&E. Data Services Corp., 194 NLRB 719	27

Page

Howard Johnson Co. v. *Detroit Local Joint Exec. Bd.*, 416 U.S. 954 ..... 4, 18, 22, 24, 29, 30
I.A.M. v. *Gonzales*, 356 U.S. 617 18
Maintenance, Inc., 148 NLRB 1299 ..... 20, 28
N.L.R.B. v. *Burns International Security Services*, 406 U.S. 272 ..... 20, 21, 22, 30
N.L.R.B. v. *Geronimo Service Co.*, 467 F.2d 903 27
Pipefitters v. *United States*, 407 U.S. 385 25
Quaker Tool and Dye, 162 NLRB 1307 28
Ranch-Way, Inc., 183 NLRB 1168 28
Royal Brand Cutlery Co., 122 NLRB 901 28
Solomon Johnsky, 184 NLRB 826 28
Spruce Up Corporation, 194 NLRB 841 21
Tri-State Maintenance Corp., 167 NLRB 933 20
United Maintenance & Mfg. Co., 214 NLRB No. 31, 87 LRRM 1469 27
United States v. *Hutcheson*, 312 U.S. 219 ..... 24, 25
Western Freight Asso., 172 NLRB 303 28
John Wiley & Sons v. *Livingston*, 376 U.S. 543 ..... 19, 31
Zim's Foodliner v. *N.L.R.B.*, 495 F.2d 1131 27

STATUTES AND REGULATION:

28 U.S.C. § 1254 (1) 2
42 U.S.C. § 2473(a)(1) 6
Clayton Act, § 6, 15 U.S.C. § 17 32
Labor Management Relations Act, § 301, 301(a) 3, 5, 29
Service Contract Act, § 4(c) 29

LEGISLATIVE MATERIAL:

Committee Print, Report of the Special Subcommittee on Labor, House Labor Committee, The Plight of Service Workers under Government Contracts, 92d Cong. 1st Sess., 1, 14-16 (1971). 19, 24

Hearings before the Subcommittee on Labor, House Labor Committee on S. 3827, H. R. 15376, 92d Cong., 2d Sess., 18 (1972). 18

S. Rep. No. 92-1131, 92nd Cong., 2d Sess., (1972). 24

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International Association of Machinists and Aerospace Workers, AFL-CIO, its District Lodges 142 and 166, and its Local Lodges 773 and 2061 pray that a writ of certiorari issue to review that part of the judgment which is adverse to them entered in the above-entitled case on November 15, 1974 by the United States Court of Appeals for the Fifth Circuit (*infra*, pp. 1a, 34a).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 504 F.2d 307 (*infra*, pp. 1a-34a). The opinion of the District Court is reported at 351 F. Supp. 813 (*infra*, pp. 35a-41a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1974 (*infra*, pp. 1a, 34a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Court of Appeals concluded that an incoming employer which takes over the performance of installation support services in an ongoing operation pursuant to a federal service contract is not the successor of the outgoing employer obligated to arbitrate the claim of the incumbent union that it is bound by, and has violated, the collective bargaining agreement between the union and the outgoing employer. The question presented is whether the Court of Appeals, in reaching this conclusion, applied the correct legal standards in determining that: (1) an incoming employer which takes over an operation by bid is inherently in a lesser position to be a successor than an incoming employer which takes over an operation by merger or purchase; (2) by reason of this lesser position, greater continuity in the identity of work force must be shown in the case of a takeover by bid than in the case of a takeover by merger or purchase to establish the incoming employer as a successor; and (3) continuity of identity in the work force is determined by calculating the percentage of the incumbent employees who remained in the incoming employer's complement in relationship to the total number of employees who had been in the employ of the outgoing employer, rather than in relationship to the total number of employees who are in the employ of the incoming employer.

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947 (29 U.S.C. § 185) provides in part that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."

STATEMENT

I. Introduction

National Aeronautics and Space Administration (NASA) replaced Trans World Airlines, Inc. (TWA), with The Boeing Company (Boeing), as the contractor to supply installation support services at John F. Kennedy Space Center, Florida (KSC). This change from TWA to Boeing is at the center of this case.

International Association of Machinists and Aerospace Workers, AFL-CIO, (IAMAW), had a collective bargaining agreement with TWA establishing the employment terms of 1,100 workers doing installation support services work at KSC. IAMAW took the position that this agreement bound Boeing as the successor to TWA. Boeing disagreed: it disregarded and departed from the terms of the IAMAW-TWA agreement. IAMAW requested, and Boeing refused, to arbitrate grievances arising from Boeing's failure to honor the IAMAW-TWA agreement.

Boeing filed a complaint in the District Court seeking a declaration that it "is not a successor to and is not bound by the collective bargaining agreement executed by . . . [IAMAW and TWA]" (AI 4). IAMAW

counterclaimed, seeking enforcement of its arbitration demand, and a declaration that "in its performance of its installation support services contract at" KSC, Boeing "is bound by the terms of the collective bargaining agreement between" IAMAW and TWA "as it applies at" KSC, and "is obligated to arbitrate any claims submitted" by IAMAW that Boeing "has violated the agreement" (AI 41). Upon cross-motions for summary judgment, the District Court declared that "Boeing is not a successor and is not bound by the collective bargaining agreement between TWA and IAM", and it denied the IAMAW's "prayer for an Order requiring arbitration" (*infra*, p. 40a, AIV 1942). It based its determination on the sole ground that Boeing populated its work force with a complement of which less than a majority were comprised of TWA employees (*infra*, p. 39a, AIV 1940).

On appeal, the Court of Appeals affirmed, but on different grounds. It observed that "there is no doubt on this record that Boeing has pursued its business in a manner substantially congruent to TWA's patterns . . ." (*infra*, p. 19a). Its next step took it from identity of the operation to identity of the work force. It began with the proposition that this Court's decision in *Howard Johnson Co.* v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 263 (1974), "establishes that 'continuity of identity in the business enterprise necessarily includes . . . a substantial continuity of identity of the work force across the change in ownership'" (*infra*, p. 19a). It noted that the "parties here have debated the substantiality of the continuity in the identity of the work force largely in terms of the 39% of Boeing's employees who had worked for TWA" (*infra*, p. 22a). It held that the standard upon which

this computation was based is erroneous. In its view "the more significant factor in determining the continuity in the identity of the work force for the purpose of determining whether a successor employer must arbitrate under its predecessor's contract is the percentage of the predecessor's employees who have continued to work for the successor," not "the percentage of the successor's employees who had earlier worked for the predecessor" (*infra*, pp. 21a-23a). Based on this newly-devised standard it determined that 35 percent "of TWA employees . . . became Boeing employees . . ." (*infra*, p. 22a).

Having concluded that the relevant ratio is 35 percent for the purpose of ascertaining substantial continuity of the work force, the Court of Appeals then turned to "other indicia of enterprise continuity . . ." (*infra*, p. 26a). It stated that "continuity in the identity of the business enterprise is more strongly shown where the predecessor employer-successor employer relationship is one of purchase and sale, or merger, than in this replacement-under-periodic-rebidding situation" (*infra*, pp. 29a-30a). To offset the hypothesized lesser continuity when the operation is taken over by bid, the Court of Appeals reasoned that "the continuity in the identity of the work force must be more substantially established than would be required were the relationship between the predecessor and successor employers one of merger, or purchase and sale" (*infra*, p. 30a). It concluded that, "given the nature of the relation between TWA and Boeing, the extent of the continuity in the identity of the work force established here is not sufficiently substantial to oblige Boeing under § 301 to arbitrate under its predecessor's contract" (*infra*, p. 31a).

II. Background

NASA's mission is to "plan, direct, and conduct aeronautical and space activities . . . ." 42 U.S.C. § 2473(a)(1). (AI 18, 154.) To this end it operates KSC within the Merritt Island, Florida, area. This area is NASA's principal launch site for manned and unmanned space launches. (AI 18, 155.)

NASA requires installation support services at KSC in order for that facility to function. For seven years through March 31, 1971, TWA performed these housekeeping functions for NASA, the services being provided pursuant to a cost-plus-award-fee contract of which the most recent extension expired on March 31, 1971. The contract emphasized the need for continuity of installation support services "at the utmost proficiency without interruption" in the event of a change from TWA to a "successor contractor." (AI 175, 184; AIII 1436-37, 1448-51; AIV 1709-13.)

Except for certain functions subcontracted by TWA, the installation support services were performed by nonsupervisory personnel employed by TWA, about 1,100 in number. These 1,100 employees were represented by IAMAW, and the terms of their employment were governed by a collective bargaining agreement between IAMAW and TWA. (AI 3, 5, 14, 19, 155, 27, 112, 171, 175, 178-296; AIII 1098, 1440-42; AIV 1710-11, 1722-23.) IAMAW representation of this class of TWA employees existed throughout the entire seven years of TWA's incumbency at KSC. The then most recent of a series of agreements between IAMAW and TWA had been entered into on January 28, 1970 and was to "remain in full force and effect to and including December 31, 1971 . . . ." (AI 3, 5 (Arts. II(d),

III(a), XXIX pp. 6-7, 192), 14; AIV 1873-74, 1898-1901.)

Unlike the installation support services work done by TWA at KSC, Boeing at KSC performed "hardware contracts" (AIV 1785-86; AIII 1442), and its then current hardware contract with NASA required it to furnish launch support of the missile (AI 20, 156, 176, 299; AIV 1704-09, 1763, 1496-97; AIII 1442). The work of launch support performed by Boeing and the work of installation support performed by TWA are separate and different (AIII 1442; AIV 1497).

Boeing employed 287 nonsupervisory personnel in the performance of the launch support work. They are represented in collective bargaining by IAMAW and its Local Lodge 2061, and the terms of their employment are governed by a collective bargaining agreement between Boeing and the IAMAW. The then current bargaining agreement was for a term from October 2, 1968 through October 1, 1971. (AI 20-21, 44, 156, 176, 299.)

III. NASA's Award to Boeing of the Contract To Furnish Installation Support Services at KSC

The wages and fringe benefits provided by the IAMAW-TWA collective bargaining agreement were substantially higher than those provided by the IAMAW-Boeing agreement.[1] This difference in labor cost is at the crux of the ensuing controversy.

Under date of June 30, 1970, NASA issued Request for Proposal No. 2-370-0 (RFP), soliciting proposals

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[1] AI 24-25, 49, 51, 52, 64, 90, 92, 94-95, 170-171; AII 919; AIII 1028-31, 1040-42, 1049-51, 1116-18, 1122-23, 1128-30, 1056-62, 1154-58, 1183-85, 1189-90, 1198-1202, 1277-79, 1281, 1296-97; AIV 1549-50.

"to provide Installation Support Services for the Kennedy Space Center" (AI 176, 302, 21-22, 157). The solicited services were to be performed under a cost-plus-award-fee type contract for a one-year period commencing February 1, 1971, with options in NASA to extend the contract for four successive one-year periods, resulting in an anticipated period of performance "of sixty (60) months duration" (AI 176, 306-307, 21-22, 157).

With minute variations the RFP called for the performance of the identical installation support services at KSC as were then being provided by TWA (*Cf.* AI 178-296 *with* AI 302-492; AII 497-617; AIII 1437-42, 1447-51; AIV 1713-25, 1764-65). The consensus is that the work is essentially the same (AIV 1722, 1460, 1787; AIII 1437-38, 1096).

TWA, Boeing, and five others submitted proposals in response to NASA's RFP (AI 23, 169). TWA and three other offerors based their computation of labor cost on the wage rates and fringe benefits established by the IAMAW-TWA agreement (AI 24, 49-50, 170). Boeing based its computation of labor cost on the wage rates and fringe benefits provided by the IAMAW-Boeing agreement (AI 23-24, 169). The disparity was marked. Of 22 job classifications, Boeing reduced the existing hourly wage rate for 20 of the 22 jobs, a reduction ranging in percentage terms from a decrease of 26% at the high to 4% at the low, and in money terms from $1.38 per hour at the high to 13½ cents at the low. (AIII 1154-58, 1183-85, 1189-90, 1198-1202, 1277-79, 1281, 1296-97; AIV 1500-07.)

On November 23, 1970, NASA selected Boeing "for negotiations leading to an award of a contract to pro-

vide" installation support services at KSC (AI 24, 46, 157; AIV 1702). NASA later explained that, while it had found that TWA's proposal was technically superior to Boeing's, it had selected Boeing because its proposed labor costs were substantially below the existing wage rates and fringe benefits presently enjoyed by the incumbent work force (AI 24-25, 49, 51, 52, 64, 90, 92, 94-95, 170-171). TWA and IAMAW protested to no avail to NASA and the Comptroller General that an award based on undercutting the existing collectively-bargained compensation of employees is in conflict with national labor policy and government procurement policy.[2] On March 11, 1971, after denial on March 10, 1971 of a preliminary injunction sought by TWA to restrain NASA from contracting with Boeing (AIV 1483-84), NASA entered into a contract with Boeing to provide installation support services at KSC (AI 31, 158).

IV. Boeing's Recruitment of a Work Force

The RFP issued by NASA required offerors to submit a basic staffing proposal, explaining in depth how the offeror would obtain competent personnel, including a statement of its plans regarding the employment of incumbent workers (AI 22, 169). In response, Boeing stated that "In order to maintain continuity of support approximately 86% of the proposed organization will be staffed by qualified incumbents" (AIV 1522, 1562). This representation that it would retain about 86 percent of the incumbent work force was repeated throughout its response (AIV 1568-71, 1574-

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[2] AI 24, 26-31, 34-35, 47-107, 114, 116, 119, 137-142, 170-172, 176; AII 618, 621; AIII 1234, 1287, 1323-24, 1345-47; AIV 1703, 1727-32, 1529, 1532-33, 1486.

75). With respect to the installation support services work performed by the TWA incumbent employees represented by the IAMAW, Boeing expected to hire a work force of about 1,000 employees, of whom it proposed to recruit "All we could get" from the TWA incumbents, no less than 86 percent and "closer to 100% . . ." (AIV 1677-78).

Boeing's proposal to hire about 86 percent of the TWA incumbents was widely known and publicized. Boeing told the press, and newspapers in circulation in Brevard County reported, that Boeing would hire a "majority" or a "large percentage" of TWA incumbents, by which it meant the 86 percent stated in its staffing plan (AIV 1462-63, 1743-45, 1769, 1537, 1648-49, 1678; AIII 1428-29, 1446-47). Boeing assured IAMAW, during their meetings in late November and early December in 1970, that it would retain most of the TWA incumbents in employment (AIII 1152, 1177, 1179, 1181, 1183, 1230, 1274-76; AIV 1499). At a meeting on November 30, 1970, Boeing informed TWA that "most of them [TWA employees] would be hired" (AIV 1623). On December 1, 1970, TWA informed its employees that "Boeing is interested in hiring the majority of TWA KSC employees" (AIV 1865-66, 1868-69, 1882; AIII 1021).

In early December 1970 Boeing and TWA devised a hiring procedure by which applications for employment would be distributed to the TWA incumbents that month with the expectation that Boeing would commence interviewing them in early January 1971.[3]

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[3] AIII 1021-23, 1026, 1033-34, 1074-75, 1077-78, 1082, 1098-99, 1108, 1427-31, 1454-55; AIV 1622-24, 1670-71, 1865-66, 1868-69, 1880-82; Keil dep. 27-31.

But the plan failed primarily because of the extremely unsettling environment which enfolded Boeing's anticipated accession. The employees were highly apprehensive about the proposed drastic undercutting of their employment standards, which entailed not only a sharp reduction in their wages (*supra*, p. 8), but hire by Boeing as new employees with zero seniority, with the consequent loss of the security of their prior service in determining the sequence of layoff (AIV 1555, 1557-60, 1688-91, 1815-18), and with lesser vacations and sick leave, poorer promotional opportunity, and lesser eligibility for participation in the savings plan and in retirement benefits (AIV 1556, 1816, 1818). There was, in addition, prolonged uncertainty as to whether Boeing would actually replace TWA (AIII 1451, 1425; AIV 1865-71). There was also the unquieted anxiety of transition. This took such forms as fear that transmission of employment applications to Boeing through TWA would be used as a means of conveying detractive information to Boeing or that the applications would not be transmitted at all; apprehension that acceptance of employment with Boeing would result in loss of severance pay due from TWA; uncertainty of the time when employment with TWA would end and employment with Boeing would begin; and concern as to the consequences of delay in submitting an employment application to Boeing (AIV 1865-67, 1869-73, 1882, 1887-91, 1894-95). Finally, there was Boeing's unprofessional conduct in interviewing TWA incumbents (AIII 1432-34), including the deception that the "first people" to submit applications "get the lead jobs" and minimization of the size of the wage cuts by quoting the "maximum money" offered for the lead positions (AIV 1654-57).

As a result of the utter confusion infusing the situation, the employees in December 1970 adopted the recommendation of the Executive Board of their Local Lodge 773 "to hold onto the applications and don't turn them in" (AIII 1194, 1354, 1362, 1364-67, 1371-72, 1394-95, 1401-02). Three factors entered into their thinking (AIII 1369-71, 1375-76, 1392-98, 1165):

1. As the incumbent work force, without whom it was thought there would be no available manpower to perform the installation support services work, withholding employment applications would be an effective lever to induce Boeing to observe the existing employment terms. The thought was captured in the phrase "They can't run the space center without us and we aren't applying for jobs with them."

2. The IAMAW-TWA agreement bound TWA's "successors and assigns" to comply with it, and a united stand by the incumbent work force would impress Boeing with the need to observe this legal obligation, while submission of employment applications would prejudice its enforceability.

3. No contract had yet been entered into between Boeing and NASA; Boeing's selection was still unresolved because of the pendency of TWA's protest before the Comptroller General; it was therefore premature to expect the incumbent work force to commit itself to a contractor whose selection was still in doubt.

At the instance of the IAMAW (the International Union), the employees were persuaded to recede from this position, and at a top-level meeting on February 19, 1971, the IAMAW informed Boeing that the TWA incumbents did seek and desire employment with Boeing, and would cooperate in every way to effectuate

an orderly lateral transfer of the TWA incumbents to Boeing's work force.[4] Boeing's spokesman stated that Boeing's recruitment of a work force was well advanced and that it may already be too late to place the TWA incumbents with Boeing. This "came as a complete shock" to the union representatives (AIII 1313). IAMAW's spokesman protested that the TWA incumbents had first priority on the jobs, and that the premise of Boeing's bid for the contract and NASA's selection of it was that most of the TWA incumbents would be retained in employment. He heatedly complained that the refusal of jobs to TWA incumbents was something the union representatives were hearing "for the very first time", that "this was a brand-new position", and that he feared that "it would appear . . . that there was a very strong possibility that most of our members . . . wouldn't get a job with . . . Boeing . . ." (AIII 1343). Boeing's spokesman concurred in that prediction (AIII 1343-44, 1313).

The prediction came true. In early January 1971 Boeing had run advertisements in a local newspaper stating that it was accepting applications for employment for the installation support services work (AIII 1024, 1032; AIV 1631-32, 1463-64, 1681-83), and on January 31, 1971, it mailed 818 offers of employment, of which 207 were sent to TWA incumbents and 601 to outsiders and former Boeing employees (AIV 1760-61, 1771). As of April 1, 1971, when Boeing took over the performance of the installation support services work, it had 981 employees on its payroll working in the installation support services jobs formerly filled by

[4] AIII 1313-14, 1316-20, 1326-44, 1388-92, 1245-46, 1248-50; AIV 1874-77, 1902-11, 1830, 1835, 1839, 1842, 1475-81, 1508-17, 1527-28, 1643.

IAMAW-represented TWA incumbents (AI 176, 299). As of March 31, 1971, it had received 1,007 acceptances of employment within this class of work, divided among 386 TWA incumbents, 129 former Boeing employees, 20 present Boeing employees, and 472 outsiders (AIV 1734-36, 1766). On this breakdown, the TWA incumbents comprised more than 38 percent of Boeing's work force. An analysis of other data furnished by Boeing depicts a different but not dissimilar breakdown. It shows that Boeing on April 1, 1971 had 970 employees on its payroll within the IAMAW-represented class, divided among 380 TWA incumbents, 138 Boeing employees (transferred, recalled from layoff, and former), 450 outsiders and two employees unidentified as to source (AI 176-177, AII 622-686). On this breakdown, the TWA incumbents comprised more than 39 percent of Boeing's work force.

V. Boeing's Takeover of the Operation on April 1, 1971

Boeing took over the performance of the installation support services work on April 1, 1971. TWA incumbents hired by Boeing, reporting for work on April 1, 1971, did the identical work at the identical place and in the identical way as when they had been in TWA's employ on March 31, 1971, the day before. But they worked at sharply reduced wages, as new employees with no seniority, and with consequent loss of their vacation and other benefits. (AIII 1028-31, 1040-42, 1049-51, 1116-18, 1122-23, 1128-30, 1056-62.)

Boeing gave each employee reporting for work on and after April 1, 1971, within the IAMAW-represented class of employees performing installation support services work, a copy of the IAMAW-Boeing agreement and a notice in the form prescribed by that

agreement, informing the employees that the IAMAW was their representative and that their terms of employment were governed by the IAMAW-Boeing agreement (AI 36-37, 143, 159). Boeing recognizes the IAMAW as the representative of the hourly employees performing installation support services work, but only as part of the KSC unit covered by the IAMAW-Boeing agreement; Boeing applies the IAMAW-Boeing agreement to the performance of that work; and it treats with the union representatives in the handling of complaints of the employees doing that work (AIV 1546-47, 1814-15, 1778-80).

VI. IAMAW and Boeing Join Issue

As stated, on March 11, 1971, NASA entered into a contract with Boeing to provide installation support services at KSC (*supra*, p. 9). On March 12, 1971, IAMAW wrote to Boeing requesting *inter alia* that Boeing adopt and observe the employment terms of the IAMAW-TWA agreement as it applies at KSC (AI 32-33, 130-131, 158). IAMAW asked Boeing to identify any "particular terms of that agreement" which Boeing might believe "are inappropriate in their application to Boeing's forthcoming operation" at KSC, informing it that the "IAMAW will negotiate with Boeing concerning those identified terms to the end that mutual agreement upon the deletion, modification, or continuance of those terms will be sought" (AI 33, 130-131).

In its reply of March 19, 1971, Boeing stated that it recognized IAMAW as the representative of the installation support service employees as part of the KSC unit covered by the IAMAW-Boeing agreement, and that it would apply the IAMAW-Boeing agree-

ment to their performance of the installation support services work at KSC. It further stated that "We do not regard Boeing as a successor to the bargaining relationship as that relationship existed between the IAMAW and TWA" (AI 33, 136). To support this position, Boeing asserted that it has "already processed some 860 employees" to be employed to perform the installation support services work, and that "[o]f this figure, 235 are current TWA employees. The remaining are either current or former Boeing employees, or are from outside sources." Accordingly, it concluded, "with the knowledge that at least 625 of the approximately 1,000 employees . . . will be non-incumbent, Boeing is of the opinion for these and other reasons that it cannot be a successor to the TWA-IAM collective bargaining agreement." (AI 34, 134.)

On April 26, 1971, the IAMAW submitted a grievance to Boeing arising from its refusal to observe the IAMAW-TWA agreement (AI 38-39, 8-9, 160):

> In accordance with Article XI(b)(5) of the Collective Bargaining Agreement between . . . [TWA and IAMAW], which . . . Boeing . . . is required to observe with respect to the performance of installation support services work at . . . [KSC], I am submitting the following grievance relating to matters general in character:
>
> 1. . . . Boeing . . . failed to retain in employment as of April 1, 1971, at least 602 members of the incumbent work force performing installation support services work at . . . [KSC], and this failure constitutes a reduction in force out of seniority order, and/or a dismissal without just cause and without compliance with the procedures requisite to that action, in violation of the IAMAW/TWA Agreement.

> 2. . . . Boeing . . . failed and fails to accord to the members of the incumbent work force whom it did retain in employment on April 1, 1971, the seniority that each employee had as of April 1, 1971, but instead treats them as new hires with zero seniority.
>
> 3. . . . Boeing . . . failed as of April 1, 1971, and fails, to observe the wages, other benefits, and other employment terms of the TWA/IAMAW Agreement as it applies to the performance of installation support services work at . . . [KSC], and which governs for its duration the wages, hours and other employment terms at . . . [KSC].

On May 6, 1971, Boeing declined to consider the merits of the grievance, stating in part that (AI 39, 12, 160):

> Consistent with our position that the contract on which the purported grievances are based has no application to The Boeing Company or any of its operations or activities, we cannot and do not recognize your letter of April 26, 1971, as a grievance and decline to respond to it as such.

On May 18, 1971, IAMAW submitted the identical grievance to Boeing at a higher level of its hierarchy, and, foreseeing an identical refusal, simultaneously invoked "the procedure prescribed by Article XII of the TWA-IAMAW agreement for final and binding arbitral determination of the grievance" (AI 39, 146-147, 160). But Boeing had anticipatorily rejected this request to arbitrate, having filed its complaint on May 10, 1971, praying for a declaration that Boeing "is not a successor to and is not bound by the collective bargaining agreement executed by the defendants and Trans World Airlines" (AI 4).

As stated, in the litigation which ensued, the Court of Appeals, affirming the District Court's judgment but disagreeing with its reasoning, concluded that Boeing was not a successor to TWA obligated as a successor to arbitrate IAMAW's claim that Boeing was bound by and had violated the IAMAW-TWA agreement (*supra*, pp. 4-5).

REASONS FOR GRANTING THE WRIT

This case illumines another part of the forest in the continuing quest for a viable law of industrial successorship. In this search this Court is committed to "the traditional case-by-case approach of the common law." *Howard Johnson Co.* v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 256 (1974). The "process of litigating elucidation"[5] requires periodic selection of a vehicle by which the probe may profitably go forward. This is such a case. As the Court of Appeals observed, "We determine our conclusions by reference to landmarks set by the Supreme Court; but its positions have been too few to survey the entire landscape, and we explore here a largely shadowed spot" (*infra*, p. 9a).

The spot is the enormously important commercial activity by which a contractor is periodically selected to perform a service through competitive bids. Even limiting the field to a private contractor's furnishing of services to a federal agency, the area is vast. Federal service contracts are negotiated "at the rate of about 21,000 annually,"[6] and "several hundred thousand employees work . . . under Government service

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[5] *I.A.M.* v. *Gonzales*, 356 U.S. 617, 619 (1958).

[6] Hearings before the Subcommittee on Labor, House Labor Committee on S. 3827, H.R. 15376, 92d Cong., 2d Sess., 18 (1972).

contracts."[6a] The practical import of the activity is therefore plain.

The situation in this case is ideal for additional demarcation of relevant criteria. The germinal test of successorship is "any substantial continuity of identity in the business enterprise before and after a change" in employers (*John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 551 (1964)); "relevant similarity and continuity of operation across the change" must exist (*ibid.*). In this case the relevant "business enterprise" is furnishing NASA with installation support services at KSC. Boeing replaced TWA in providing NASA in essentially the same way with essentially the same services formerly performed by TWA. Complete continuity was maintained between TWA and Boeing in the performance of that work, TWA stepping out as Boeing stepped in. Succession exists in every literal and realistic sense. Accordingly, the clarity of the underlying situation presents an optimum opportunity to fashion refined standards by which to confirm or negate successorship as a matter of law.

I

The Court of Appeals framed part of the inquiry as follows: "It is well established that the principle of *Wiley* applies to corporate successorships accomplished through purchase and sale rather than merger. We consider here the extent to which the *Wiley* test of continuity in the business enterprise can be satisfied in a periodic rebidding service contract context . . ." (*infra*, p. 27a). It concluded that, "where the rela-

[6a] Committee Print, Report of the Special Subcommittee on Labor, House Labor Committee, The Plight of Service Workers under Government Contracts, 92d Cong., 1st Sess., 1 (1971).

tionship between the predecessor and successor employers is one of replacement in the periodic rebidding context, . . . the continuity in the identity of the work force must be more substantially established than would be required were the relationship between the predecessor and successor employers one of merger, or purchase and sale" (*infra*, p. 30a). The first facet of the question presented, therefore, is whether successorship is to be tested by more rigorous criteria when the takeover of an operation is effectuated by bid rather than merger or purchase.

The beginning point is this Court's decision in *N.L.R.B.* v. *Burns International Security Services*, 406 U.S. 272 (1972). There, successorship was found although Burns was the successful bidder on a contract to provide security services at an airport facility in competition with the previous contractor, Wackenhut. The only difference between *Burns* and this case, with respect to the status of the incoming and outgoing employers as competitors seeking an award to perform the same work, is that in *Burns* the successful bidder contracted to furnish services to a private enterprise, whereas in this case the successful bidder contracted to furnish services to a federal agency. But as the National Labor Relations Board has long held with judicial approval, successorship does not depend upon the private or governmental character of the entity to whom the services are furnished, but on substantial continuity and identity in the services rendered to that entity by the outgoing and incoming contractors.[7]

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[7] *Maintenance, Inc.*, 148 NLRB 1299 (1964) (successor employer contracted with NASA to provide services); *Tri-State Maintenance Corp.*, 167 NLRB 933 (1967), enforced as modified,

Indeed, an observation in the dissenting opinion in *Burns* emphasizes Boeing's status as the successor employer in this case. The dissent is premised on the proposition that there can be no successorship when the sole connection between the incoming and outgoing employers "is the hiring of some of the latter's employees and the performance of some of the work which was previously performed by the latter . . ." (406 U.S. at 306). The dissent stated that the situation would be different:

> where the new employer continues to make use of tangible or intangible assets used in carrying on the business of the first employer. [406 U.S. at 302.]

The dissent reiterated that:

> . . . we can require another employing entity to perform the contract only when he has succeeded to some of the tangible or intangible assets by the use of which the employees might have expected the first employer to have performed his contract with them. [406 U.S. at 305.]

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408 F.2d 171 (C.A.D.C. 1968) (successor employer contracted with General Services Administration to provide services); *ABC Food Service*, 176 NLRB 426 (1969) (successor employer contracted with Alameda Naval Air Station to provide services); *Emerald Maintenance*, 188 NLRB 876 (1971), enforced as modified, 464 F.2d 698 (C.A. 5, 1972) (successor employer contracted with Laredo Air Force Base to provide services); *Geronimo Service Co.*, 191 NLRB 450 (1971), enforced, 467 F.2d 903 (C.A. 10, 1972) (successor employer contracted with the United States Air Force to provide services at Holloman Air Force Base, New Mexico); *Spruce Up Corporation*, 194 NLRB 841 (1972), modified on other grounds, 209 NLRB No. 19 (1974) (successor employer contracted with United States Army and Air Force Exchange Service to provide services at Fort Bragg, North Carolina).

The missing element which the dissent thought to be critical is supplied in this case. The TWA-NASA agreement required that (AI 192):

> The Contractor shall utilize available assigned Government working space, equipment, tools, supplies, materials and services . . . .

NASA's Request For Proposals stipulated the identical requirement (*id.* at 324). And the ensuing NASA-Boeing agreement contained the identical requirement (AII 702). Accordingly, precisely as the dissent envisaged, but the majority found to be unnecessary, Boeing makes use of the identical assets—space, equipment, tools, supplies, materials and services—formerly used by TWA to perform the same work. Given this situation, in the words of the dissent in *Burns*, successorship is supported by "the legitimate expectation of employees . . ." (406 U.S. at 305).

Nevertheless, the Court of Appeals distinguishes *Burns* on the basis that it arose in a duty to bargain context rather than a duty to arbitrate context (*infra*, pp. 27a-28a), disregarding this Court's stress in *Howard Johnson* that the "basic policies" pertinent to successorship should not be different merely because the issue arises in an unfair labor practice proceeding rather than in an LMRA § 301 suit (417 U.S. at 256). More fundamentally, however, the Court of Appeals disregards the direction to policy that Congress gave when on October 9, 1972, it amended the Service Contract Act by the addition *inter alia* of a new section 4(*c*) providing that a succeeding contractor shall pay its service employees in the performance of a federal service contract no less than the wages and fringe benefits provided for in the collective bargaining agree-

ment with the predecessor employer (41 U.S.C. § 353 (c)):

> No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided,* That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

Accordingly, so long as the incoming employer performs under a succeeding contract with a federal agency "under which substantially the same services are furnished" as were provided by the outgoing employer to the federal agency, the existing collective bargaining agreement with the predecessor employer establishes the norm for the compensation of the employees. The congressional purpose is to provide "assurance that employees working for service contractors under a collective bargaining agreement will have wages and fringe benefits under a new service contract no lower than those under current agreement." S. Rep. No. 92-1131, 92d Cong., 2d Sess., 1 (1972). "Ordinarily, where service employees are covered by a collective bargaining agreement, a successor contractor

furnishing substantially the same services at the same location will be obligated to pay such service employees no less than wages and fringe benefits required by such agreement. This requirement would likewise apply to prospective wages and fringe benefits." *Id.*, 4.

The immediate spur to adoption of section 4(c) was the disastrous experience at Kennedy Space Center depicted in this very case, described by the House Labor Subcommittee as "a bitter case history."[8] Given that experience section 4(c) was adopted "to provide a measure of stability and dignity to service contract employees . . . ." S. Rep. No. 92-1131, 92nd Cong., 2d Sess., 4 (1972).

But the Court of Appeals ignores the policy which underlies section 4(c), saying that section 4(c) "was not in effect at the time of the events which gave rise to this controversy," is not to "apply retroactively," and, given its limitation to governmental contracting, is not to be read "to express any Congressional statement as to the interpretation of preexisting successorship law in general" (*infra*, p. 8a, and n. 8). This constriction of perspective recalls Justice Holmes' admonition that in reading legislation " 'it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.' " *United States* v. *Hutcheson*, 312 U.S. 219, 235 (1941). This Court reiterated in *Howard Johnson* that the "federal common law [in an LMRA §301 suit] must be 'fashion[ed] from the policy of our national labor laws' " 417 U.S.

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[8] Committee Print, Report of the Special Subcommittee on Labor, House Labor Committee, The Plight of Service Workers Under Government Contracts, 92d Cong., 1st Sess., 14-16 (1971).

at 255). Among the "congressional pronouncements" to which to look (*ibid.*), section 4(*c*) is now of the first rank and relevance as a source of law in shaping successorship. For its policy makes crystal clear that a change in the identity of the contractor-employers in furnishing a service should not deprive the employees of the benefits of an existing collective bargaining agreement which had established the labor standards for the performance of the work in an ongoing operation. When the Court of Appeals says, in disregard of the vivifying policy of section 4(*c*), that it is "left to the guidance and direction of the developing case law regarding successorship controversies" (*infra*, p. 8a), it shuts from sight the one sure recent light. To grope along without the aid thrown by this "'cross light'" is to try to read the will of Congress without the illumination it has given.[9] That is not the way to read its will.

II

The Court of Appeals adopted a new and different standard than has hitherto been employed by which to measure the percentage of the incoming employer's work force that is populated by employees who had been in the employ of the outgoing employer for the purpose of ascertaining continuing substantial identity of the employee complement. The Court of Appeals noted that "the parties here have debated the substantiality of the continuity in the identity of the work force largely in terms of the 39% of Boeing's employees who had worked for TWA" (*infra*, p. 22a).

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[9] *Pipefitters* v. *United States*, 407 U.S. 385, 411-412 (1972); see also, *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 250 (1970); *United States* v. *Hutcheson*, 312 U.S. 219, 234-235 (1941).

This percentage was arrived at by utilizing the total number of employees in the incoming employer's work force as the denominator and the number of those employees who had come from the outgoing employer as the numerator. The Court of Appeals, however, arrives at a percentage of "about 35%," by utilizing the total number of employees in the *outgoing* employer's work force as the denominator and the number of those employees who went with the incoming employer as the numerator (*infra*, p. 22a). According to the Court of Appeals, "the more significant factor in determining the continuity in the identity of the work force for the purpose of determining whether a successor employer must arbitrate under its predecessor's contract is the percentage of the predecessor's employees who have continued to work for the successor," not the "percentage of the successor's employees who earlier worked for the predecessor" (*infra*, pp. 21a-23a).

The formula newly-devised by the Court of Appeals can lead to quite bizarre ratios. *Example 1:* The outgoing employer has a work force of 1,000. The incoming employer continues the operation in unchanged form, but on a reduced scale, employing a work force of 500 all of whom came from the outgoing employer. According to the Court of Appeals, although all of the incoming employer's force had been in the employ of the outgoing employer, the relevant ratio is 50 percent. *Example 2:* On a takeover by merger the new employer absorbs into its existing force of 750 all of the 250 employees comprising the old employer's work force. According to the Court of Appeals, although the old employer's work force makes up but 25 percent of the new employer's work force, the relevant ratio is 100 percent.

The National Labor Relations Board with judicial approval has repeatedly rejected the formula newly adopted by the Court of Appeals. As it recently reiterated, "under circumstances where operations under the new employer have not been changed in any substantial way, the standard for determining the new employer's obligations to bargain with the union representing the employees of the predecessor is not . . . the percentage of the predecessor's total complement that the new employer retains, but the percentage of the new employer's work force which had previously worked for the predecessor in the bargaining unit." [10]

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[10] *United Maintenance & Mfg. Co.*, 214 NLRB No. 31, 87 LRRM 1469, 1472 (1974). See also the following cases, in each of which the scope of the new employer's operation was sharply reduced over that of the old employer, but in which successorship was found based on the percentage of the new employer's work force which had come from the old employer: *Dorrance J. Benzchawel, d/b/a Parkwood IGA*, 201 NLRB 905 (1973), enforced, *sub nom., Zim's Foodliner* v. *N.L.R.B.*, 495 F.2d 1131 (C.A. 7, 1974) (the purchaser of a single store is a successor employer although this one store was formerly part of a multi-store unit of 11 stores operated by the predecessor employer); *N.L.R.B.* v. *Geronimo Service Co.*, 467 F.2d 903, 904 (C.A. 10, 1972) (the incoming employer was a successor although it took over only the maintenance painting operation, whereas the predecessor employer performed both maintenance painting and refuse collection); *Emerald Maintenance* v. *N.L.R.B.*, 464 F.2d 698, 700 (C.A. 5, 1972) (the original unit was composed of "all employees . . . performing service work at Laredo Air Force Base," while the succeeding unit was confined to billeting and maintenance employees); *G.T.&E. Data Services Corp.*, 194 NLRB 719 (1971) (the Board found successorship where the incoming employer provided data processing services with a complement of 21 employees, and this complement of 21 when formerly employed by the predecessor was part of a work force of 3,000 employees furnishing telephone services); *Fry Roofing Company*, 192 NLRB 791 (1971) (a "split" in the predecessor's unit does not detract from the status of the second employer as the successor of that part of the "split" which it

The Court of Appeals would distinguish this standard on the ground that it is suitable in a duty to bargain context but not in a duty to arbitrate context (*infra*, pp. 23a-24a). But in either context the central inquiry is directed to determining whether continuity and similarity of the operation has been maintained, of which substantial continuity of identity in the work force is one component. To say, as here, that employing one standard 39 percent may be enough in a refusal to bargain context, but employing a different standard 35 percent does not suffice in a duty to arbitrate context, is to allow sheer impressionism to rule. A viable and coherent law of successorship cannot be

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took over which of itself constitutes an appropriate unit); *Ranch-Way, Inc.*, 183 NLRB 1168, enforced, 445 F.2d 625 (C.A. 10, 1971), vacated and remanded to NLRB on other grounds, 81 LRRM 2736 (C.A. 10, 1972) (second employer was successor to one of the predecessor's 11 mills and 5 grain elevators operating in 5 states covered by a single national agreement); *Solomon Johnsky*, 184 NLRB 826 (1970) (second employer was the successor to one of the predecessor's four meat markets); *Western Freight Asso.*, 172 NLRB 303 (1968) (the predecessor conducted a freight handling operation at three "Houses" employing over 500 workers; the successor conducted a freight handling operation at a single, new automated house, replacing one of the predecessor's houses, and employed at this house 110 men recruited from all three of the predecessor's houses, with the predecessor continuing to operate two of its houses; successorship was found although the new employer operated only one of three of the predecessor's houses); *Quaker Tool and Dye*, 162 NLRB 1307 (1967) (the union was certified as the representative of a two-plant unit; the predecessor leased one of the two plants; the lessee was held to be a successor bound by the certification although it operated only one of the two plants); *Maintenance, Inc.*, 148 NLRB 1299 (1964) (the predecessor performed both janitorial services and garbage collection; the successor performed only janitorial services); *Royal Brand Cutlery Co.*, 122 NLRB 901 (1959) (the predecessor operated a plant, including a warehouse and importing business as part of the operation; the successor acquired the plant, less the warehouse and importing business).

built by finding differences between 39 percent and 35 percent brought about by needless overrefinement. It should be instructive that, in newly enacting section 4(c) of the Service Contract Act, Congress based successorship solely on the incoming employer's performance "under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished", and not at all on the composition of the incoming employer's work force.

III

The Court of Appeals holds that, "given the nature of the relation between TWA and Boeing, the extent of the continuity in the identity of the work force established here is not sufficiently substantial to oblige Boeing under § 301 to arbitrate under its predecessor's contract" (*infra*, p. 31a). This determination, wholly conclusory, rests on erroneous legal standards whether or not the correct ratio is 39 percent or 35 percent.

In *Howard Johnson*, this Court reiterated that the *Wiley* successorship test requires "'substantial continuity of identity in the business enterprise' before and after a change of ownership . . ." (417 U.S. at 263). It fleshed out this test by its statement that "[t]his continuity of identity in the business enterprise necessarily includes, we think, *a substantial continuity in the identity of the work force* across the change . . ." (*ibid.*, emphasis supplied). It concluded that no successorship existed in *Howard Johnson* because "there was plainly *no substantial continuity of identity in the work force* hired by" the incoming employer with that of the outgoing employer (*id.* at 264, emphasis supplied). Thus, this Court looks to *substantial* overlapping population to determine the sufficiency

of the nexus linking the work forces of the incoming and outgoing employers.

In this case substantial overlapping population plainly exists. Under the prevailing standard Boeing retained 38+ or 39+ percent of the TWA incumbents (*supra*, p. 14). Under the standard newly-devised by the Court of Appeals Boeing retained 35 percent of the TWA incumbents. Either 39 percent or 35 percent is substantial by any measure. In contrast, in *Howard Johnson*, under the prevailing standard, the overlapping population was 20 percent (9 over 45), and under the Court of Appeals' standard, the overlapping population was 17 percent (9 over 53) (417 U.S. at 252).

But the link between the TWA and Boeing work forces is substantially more than either 39 percent or 35 percent. *Howard Johnson* confirms an incoming employer's "right not to hire any of the former . . . employees, *if it so desired*" (417 U.S. at 262, emphasis supplied). Boeing did not so desire. Instead, it planned to employ at least 86 percent of the TWA incumbents (*supra*, pp. 9-10). Boeing proposed to utilize the incumbent work force as its work force and by its own plan therefore established "substantial continuity in the identity of the work force . . ." Cf., *N.L.R.B.* v. *Burns International Security Services*, 406 U.S. 272, 294-295 (1972).

To be sure, Boeing ultimately populated its work force, not with the 86 percent of the incumbent employees that it planned, but with 39 percent or 35 percent depending on the standard applied. But the very reason which accounts for this diminution is Boeing's refusal to observe the terms of the IAMAW-TWA agreement. The work force would have been fully oc-

cupied with TWA incumbents had Boeing, in conformity with the IAMAW-TWA agreement, maintained their existing wages and fringe benefits and preserved their preexisting seniority acquired by service at KSC with TWA. Instead, it treated them, in derogation of the IAMAW-TWA agreement, as mere applicants for employment with whom it could do as it would. The resistance of TWA incumbents to immediate submission of employment applications to Boeing—which is Boeing's stated reason for employing others—was in essence resistance to Boeing's refusal to adhere to the IAMAW-TWA agreement. Boeing is thus using the condition it brought about by dishonoring the IAMAW-TWA agreement as the basis for its claim that it is not required to observe that agreement. Boeing's reasoning is therefore wholly circular. On its theory the act and consequence of violating the agreement becomes the reason why it is not obliged to observe it.

A viable law of successorship cannot be built on circularity. A dog may be entertained by chasing its own tail. The law should not be.

IV

The seminal essence of *Wiley* is that a switch in employers in an ongoing operation should "be balanced by some protection to the employees from a sudden change in the employment relationship" (376 U.S. at 549). Its underlying philosophy is that employees are not mere pawns in a commercial game whose welfare may be sacrificed in any way which suits an entrepreneur's pecuniary or managerial interest on a takeover. This case epitomizes the vice which a meaningful development of *Wiley* should suppress. Boeing

decimated the incumbent work force, destroyed its employment standards, and treated its members as if they were mere supplicants to whom it owed no more duty than to an utter stranger. A healthy law of successorship should no longer tolerate such industrial absolutism. It should give contemporary meaning to the continuing policy of Congress that "the labor of a human being is not a commodity or article of commerce." [11]

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1975

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[11] Clayton Act, § 6, 15 U.S.C. § 17.

APPENDIX

I.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

No. 73-1052

THE BOEING COMPANY, *Plaintiff-Appellee-Cross Appellant*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL., *Defendants-Appellants-Cross Appellees.*

November 15, 1974

* * *

Appeals from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, and GEWIN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

This clash between the Boeing Company (Boeing) and the International Association of Machinists and Aerospace Workers (IAMAW) over Boeing's obligations to some 1100 installation support services employees at John F. Kennedy Space Center, Florida, has spread far beyond the launch pad and into the executive bureaucracy, the halls of Congress, and several federal courtrooms. In other forums, the great issues of national labor policy and government contracting policy have been debated and determined in their ways. Ours is the more mundane, but nonetheless complex, task of defining the obligations of a successor employer to arbitrate claims submitted by a union on behalf of incumbent employees of a predecessor employer.

I

Facts

From March, 1964, until April 1, 1971, Trans World Airlines Inc. (TWA) performed "installation support services"[1] at Kennedy Space Center under contract with the National Aeronautics and Space Administration (NASA). The approximately 1100 nonsupervisory personnel employed by TWA were represented in collective bargaining by IAMAW. A collective bargaining agreement between TWA and IAMAW,[2] entered into on January 28, 1970, was in force at the time TWA's contract with NASA expired, and was to "remain in full force and effect to and including December 31, 1971." Two subordinate IAMAW units, District Lodge 142 and Local Lodge 773, helped administer the TWA-IAMAW agreement.

In June, 1970, NASA invited bids for performance of the Kennedy Space Center installation services duties for a one-year period commencing February 1, 1971 (performance to begin April 1, 1971), with option for NASA to extend the contract for four successive one-year periods. TWA, Boeing, and five other companies submitted proposals. Four of the offerors, including TWA, based their

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[1] These services included maintenance, refurbishing, and alteration of buildings, and new construction involving outlays of less than $10,000; maintenance of roads and grounds; operation and maintenance of water and sewage plant, heating and air-conditioning systems, heavy equipment, and automotive equipment; ordering and distribution of supplies; and similar housekeeping functions. TWA subcontracted guard, fire, and janitorial services to other firms.

[2] When TWA, an air carrier, secured the NASA support services contract in 1964, TWA and IAMAW already had a nationwide collective bargaining agreement, which was governed by the Railway Labor Act, 45 U.S.C. §§ 151 et seq. By supplemental agreement entered into between TWA and IAMAW, the non-carrier Kennedy Space Center employees of TWA were brought under the previous agreement.

computations of labor costs on the wage rates and fringe benefits established by the existing TWA-IAMAW collective bargaining contract. Boeing based its computation of labor costs on the wage rates and fringe benefits provided under its own existing collective bargaining agreement with IAMAW, which covered some 287 Kennedy Space Center employees performing mission support services known as "hardware contracts" on the Saturn V launch vehicle. The wages and benefits fixed by the Boeing-IAMAW agreement were substantially below those specified in the TWA-IAMAW agreement,[3] and the Boeing-IAMAW agreement was administered through different local subordinates, District Lodge 166 and Local Lodge 2061.

In November, 1970, NASA announced that Boeing had been selected to perform the installation support services at Kennedy Space Center. Although both TWA and IAMAW vigorously protested NASA's decision,[4] Boeing

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[3] Hourly rates on Boeing's wage scale were lower than TWA's in 20 of the 22 job classifications, with the differentials ranging from 4% to 26% (of the lower rates).

[4] IAMAW notified NASA in November and December of 1971 of its claim that installation support services labor rates at Kennedy Space Center were governed by the TWA-IAMAW agreement. TWA likewise protested that government purchasing power was being used "as an instrument to deprive organized employees of an incumbent contractor of the wages and other benefits gained through collective bargaining, a result contrary to national labor policy and government procurement policy." Nevertheless, in a January 6, 1971 letter to the Comptroller General of the United States, NASA indicated that it had found TWA's proposal to be technically superior to Boeing's, but had selected Boeing primarily because of Boeing's substantially lower proposed labor costs.

On March 1, 1971, TWA brought an action against NASA in United States District Court for the District of Columbia to set aside NASA's selection of Boeing, and moved for a preliminary injunction to restrain NASA from entering into a contract with Boeing. After denying a motion to intervene by IAMAW, the district court on March 10, 1971, denied TWA's motion for a preliminary injunction. On April 26, 1971, the parties entered into a stipulation dismissing the action without prejudice.

began performance of the contract on April 1, 1971, with a work force of 981,[5] of whom 380 were TWA incumbents. On this appeal the parties have debated at length the reasons why a greater percentage of incumbents were not hired by Boeing. The district court's opinion provides a partial summary:

> When Boeing first learned that it would get the contract for support services commencing April 1, 1971, it delivered over 1,000 job application forms to TWA's Industrial Relations office for dissemination to TWA employees. Boeing offered evidence that IAM[AW] officials—International and local—had discouraged TWA support service employees from seeking employment with Boeing and for that reason by April, 1971, of the approximately 1,000 Boeing employees hired to perform under the support services contract less than 400 were formerly TWA employees. At first in the course of this suit the defendants contested that position . . . and contended there was discrimination by Boeing in its hiring. However, in its brief filed July 3, 1972, IAM[AW] withdrew for the purposes of this case that contention.

Boeing Co. v. International Association of Machinists & Aerospace Workers, M.D.Fla. 1972, 351 F.Supp. 813, 815. IAMAW emphasizes here, however, that the TWA employees were dissatisfied with the wages and benefits offered under the Boeing contract and that the environment surrounding Boeing's takeover was highly unsettled. In particular the union argues that Boeing and NASA had not yet entered into a contract, and a TWA protest to the contract award was still pending, as of early February, 1971, so that it would have been premature for the incumbent work force to commit itself to a contractor whose

[5] This figure represents the total number of employees performing installation support services work and within the unit claimed to be covered by the TWA-IAMAW agreement.

selection was still in doubt. In any case, by February 19, 1971, when an IAMAW spokesman told Boeing representatives that the union would cooperate in distributing Boeing employment applications to TWA incumbents and in transmitting completed applications to Boeing, Boeing had extended offers to and received acceptances from 521 non-incumbents, more than half its workforce.

When Boeing took over performance of the installation support services work on April 1, 1971, the TWA incumbents hired by Boeing reported for work as new employees with no seniority and at reduced wages. Boeing gave each of the IAMAW-represented employees a copy of the Boeing-IAMAW agreement and a notice stating that IAMAW was its employees' representative and that terms of employment were governed by the Boeing-IAMAW agreement.

> On April 26, 1971, IAMAW advised Boeing that: [i]n accordance with Article XI(b)(5) of the [TWA-IAMAW] collective bargaining agreement . . . [it was] submitting the following grievance relating to matters general in character:
>
> 1. The Boeing action failed to retain in employment as of April 1, 1971, at least 602 members of the incumbent work force performing installation support services work at Kennedy Space Center, Florida, and this failure constitutes a reduction in force out of seniority order, and/or a dismissal without just cause and without compliance with the procedures requisite to that action, in violation of the IAMAW/TWA agreement.
>
> 2. The Boeing Company failed and fails to accord to the members of the incumbent work force whom it did retain in employment on April 1, 1971, the seniority that each employee had as of April 1, 1971, but instead treats them as new hires with zero seniority.

> 3. The Boeing Company failed as of April 1, 1971 and fails, to observe the wages, other benefits, and other employment terms of the TWA/IAMAW agreement as it applies to the performance of installation support service work at Kennedy Space Center, Florida, and which governs for its duration the wages, hours and other employment terms at the Kennedy Space Center.

Boeing declined to consider the merits of the grievances, stating in part:

> As of April 1, 1971, the date on which Boeing assumed its responsibilities under the Installation Support Services contract, a substantial majority of the bargaining unit employees were from sources other than Trans World Airlines. Therefore, Boeing is of the opinion that it is not a successor to the TWA/IAM[AW] agreement. Furthermore, even if the majority of the Boeing work force was made up of former TWA employees, it is the position of the Boeing Company that a finding of successorship would be precluded because of the substantial change in the employing industry.
>
> Consistent with our position that the contract on which the purported grievances are based has no application to the Boeing Company or any of its operations or activities, we cannot and do not recognize your letter of April 26, 1971, as a grievance and decline to respond to it as such.

During the pendency of this dispute IAMAW informed Boeing that, while it would continue to press for adoption of the TWA-IAMAW agreement, it would utilize the dues deduction authorization cards of Local Lodge 2061 (the IAMAW local affiliated with Boeing) until the issue was resolved. Boeing deducted union dues in accordance with the individual authorizations; instead of transmitting the

checked-off dues to Local 2061 pursuant to the authorization, however, Boeing deposited the collected dues in an escrow fund on the ground that IAMAW had refused to recognize the Boeing-IAMAW collective bargaining agreement.

On May 10, 1971, Boeing filed this suit under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, against IAMAW in the United States District Court for the Middle District of Florida, seeking a declaratory judgment that Boeing "is not a successor to and is not bound by the collective bargaining agreement executed by the defendant and Trans World Airlines." IAMAW filed a counterclaim seeking a declaration that Boeing is bound by the terms of the TWA-IAMAW agreement and an order compelling Boeing to arbitrate the grievances submitted by IAMAW, and an order requiring Boeing to remit the dues which the employees had authorized the company to check-off from their wages.

Upon cross-motions for summary judgment, the District Court declared that "Boeing is not a successor and is not bound" by the TWA-IAMAW collective bargaining agreement, and declined to order Boeing to arbitrate the grievances submitted under that agreement. The District Court did, however, require Boeing to remit the dues previously withheld and escrowed. IAMAW appeals the declaration that Boeing is not a successor; Boeing cross-appeals the order that it turn over the checked-off dues. We affirm.

II

Successorship

Had 41 U.S.C. § 353(c) been in effect at the time when the events giving rise to this controversy occurred, this matter would have been much simpler of resolution. That section provides in effect that a government service contractor, such as Boeing, which succeeds to a contract under

which it furnishes substantially the same services as its predecessor, shall not pay its employees less than its predecessor paid under its collective bargaining agreement, unless such terms are found by the Secretary of Labor to be substantially at variance with the going rate in the locality. [6]

Section 353(c) was not in effect at the time of the events which gave rise to this controversy, however; it was added to the Service Contract Act of 1965, 41 U.S.C. § 351 et seq., by amendment in 1972, 86 Stat. 789. [7] Nor does § 353(c) apply retroactively. We are thus left to the guidance and direction of the developing case law regarding successorship controversies. [8]

Before approaching these cases we note that we cannot rest upon the formal concepts of merger, successorship, or

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[6] Section 353(c) provides in terms that

> No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

[7] The section was, in fact, added by Congress largely in response to the controversy at bar.

[8] Limited as § 353(c) is to government contracting, we do not read it to express any Congressional statement as to the interpretation of preexisting successorship law in general. Nor do we think that the application of existing successorship case law principles to this case is altered by the fact that the federal government is the primary "employer" here.

alter egoism developed in fields alien to labor law. In the sprawling workaday world of employer-employee relationships we go to the plant to find human continuity and pragmatic identity of enterprise; we are not pinned by the precisions and precedents fixed and formulated in the law of taxation, securities, or real property.

A

General Principles

The district court reasoned in this case, 351 F.Supp. 813, 816, that NLRB v. Burns Int'l Security Servs. Inc., 1972, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61, had established that an employer will not be bound as a successor to arbitrate under its predecessor's labor contract unless it has employed a majority of its predecessor's personnel; since Boeing did not meet that standard, the district court determined that Boeing was not bound to arbitrate. While we ultimately conclude as well that IAMAW had made out an insufficient case on the law here, we are concerned that the district court has misapprehended *Burns*. Thus, with the additional benefit of the Supreme Court's opinion in Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 1974, —— U.S. ——, 94 S.Ct. 2236, 41 L.Ed.2d 46, which was undecided at the time of the district court's opinion, we proceed at some length to elaborate our understanding of the relevant case law.

The course through the cases on which the parties dispatch us leads over ground both dense and largely uncharted. This case requires the resolution of difficult issues regarding the contractual freedom and expectations of employers and the expectations and reliance of employees. We determine our conclusions by reference to landmarks set by the Supreme Court; but its positions have been too few to survey the entire landscape, and we explore here a largely shadowed spot.

The reference points which the Supreme Court has established lie chiefly in three cases: John Wiley & Sons, Inc. v. Livingston, 1964, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898; *Burns, supra;* and *Howard Johnson, supra.* These three cases not only offer three different perspectives on the successorship problem, but at times they seem to illuminate a different background. Thus, it is necessary to consider them individually and chronologically in order to determine the coordinates of established principles. Indeed, as the Supreme Court has counselled, "In our development of the federal common law [in this area] we must necessarily proceed cautiously, in the traditional case-by-case approach of the common law." *Howard Johnson* —— U.S. at ——, 94 S.Ct. at 2240, 41 L.Ed.2d at 53.

The primary case on which IAMAW relies, and which Boeing seeks to distinguish, is *Wiley, supra,* in which the Supreme Court held that "the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, . . . the successor employer may be required to arbitrate with the union under the agreement." 376 U.S. at 548, 84 S.Ct. at 914, 11 L.Ed.2d at 904.

In *Wiley* a small publishing house, Interscience, with 80 employees, 40 of whom were union-represented, merged into Wiley, a firm with larger assets and commitments and a premerger total of about 300 employees. Interscience ceased to exist in its own right after the merger, and almost all[9] the 40 union-represented employees of Interscience

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[9] The *Wiley* opinion in the Supreme Court states that all the unionized employees at Interscience "except a few . . . continued in Wiley's employ," 376 U.S. at 545, 84 S.Ct. at 912, 11 L.Ed.2d at 902, and refers to "the wholesale transfer of Interscience employees to the Wiley plant," 376 U.S. at 551, 84 S.Ct. at 915, 11 L.Ed.2d at 905. Since the Supreme Court's opinion, the district court originally hearing the case has stated that "[t]he union in

stayed on with Wiley and were mingled with the existing work force at Wiley's plant, where they pursued the same kind of work as before. The employees' union and Wiley were unable to agree on the effect of the merger on the existing collective bargaining agreement between Interscience and the union. The union asserted grievances concerning "conditions of employment typically covered by collective bargaining agreements and submitted to arbitration if other grievance procedures fail. Specific provision for each of them [was] made in the Interscience agreement." 376 U.S. at 554, 84 S.Ct. at 916, 11 L.Ed.2d at 907. Wiley refused to arbitrate, however, protesting its freedom from a contract which it had not joined. Ultimately the union sued under § 301 to compel arbitration.

The Supreme Court recognized that ordinary contract law would not bind Wiley to the Interscience agreement. Under § 301, however, the controlling principles were held to be a matter of federal law, to be developed from the policies embedded in the "national labor laws." *See* Textile Workers Union v. Lincoln Mills, 1957, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972. The Court rested its conclusions regarding the requirements of arbitration on two such policies. First,

> [e]mployees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in

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Wiley represented 40 employees in the Interscience plant, 29 of whom went to work for Wiley. . . ." McGuire v. Humble Oil & Refining Co., S.D.N.Y.1965, 247 F.Supp. 113. However that may be, in *Howard Johnson* the Supreme Court read *Wiley* as a case in which "the surviving corporation hired *all* of the employees of the disappearing corporation." — U.S. at —, 94 S.Ct. at 2241, 41 L.Ed.2d at 56.

established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

376 U.S. at 549, 84 S.Ct. at 914, 11 L.Ed.2d at 904. Second:

> The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by "the relative strength . . . of the contending forces," [United Steelworkers v.] Warrior & Gulf [Navigation Co., 19], 363 U.S. [574,] at 580, 80 S.Ct. 1347, at 1352, 4 L.Ed.2d [1409,] 1416.
>
> The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded.

Furthermore, the Court considered that

> a collective bargaining agreement is not an ordinary contract. ". . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." Warrior & Gulf, *supra*, 363 U.S. at 578-579, 80 S.Ct. at 1351, 4 L.Ed.2d [at 1415]. . . . Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.

376 U.S. at 550, 84 S.Ct. at 914, 11 L.Ed.2d at 905. "Therefore," the Court concluded,

> although the duty to arbitrate . . . must be founded on a contract, the impressive policy consideration favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy.

376 U.S. at 550-551, 84 S.Ct. at 915, 11 L.Ed.2d at 905 (footnote omitted).

Consonant with its reasoning, the Court limited application of its holding to cases in which there was "substantial continuity of identity in the business enterprise before and after a change," so that the duty to arbitrate was not "something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." 376 U.S. at 551, 84 S.Ct. at 915, 11 L.Ed.2d at 905.

The broad principle of employee protection against sudden changes in the employment relationship which the Court first sketched in *Wiley* is not, however, the complete picture. Most significantly, the Supreme Court has somewhat shifted its view of the policy framework on which the *Wiley* result hung, as evidenced by its opinion in NLRB v. Burns Int'l Security Servs., Inc., *supra*, on which Boeing relies here.

Burns involved an NLRB action to enforce an order requiring a successor employer (1) to recognize and bargain with the union representing its predecessor employer's employees, and (2) to adhere to the collective bargaining

agreement which had bound the predecessor employer. The predecessor-successor relationship was of the service contract type involved in the case at bar: on submitting the best bid in an annual rebidding, Burns was chosen to replace its predecessor, Wackenhut, at the supplier of plant protection services for the Lockheed Aircraft Service Co. at a California airport. When Burns took over the security operation, employing 42 workers, 27 of whom had been with Wackenhut in identical jobs, Burns refused to recognize the United Plant Guard Workers of America (UPG), which had been certified four months earlier as the exclusive bargaining representative of Wackenhut's employees.

The Court's opinion, which turned "to a great extent on the precise facts involved here," 406 U.S. at 274, 92 S.Ct. at 1575, 32 L.Ed.2d at 65 was in two parts.

First, the Court held 5 to 4, that assuming the appropriateness of the bargaining unit,

> it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact.

406 U.S. at 278, 92 S.Ct. at 1577, 32 L.Ed.2d at 68. Four Justices dissented to this holding on the grounds that a continuing union majority had not been shown with mathematical certainty and that notions of successorship such as underlay *Wiley* ought not apply even to require the union recognition here, given the nature of the predecessor-successor relationship.

Second, the Court held unanimously that Burns was not bound to observe the substantive terms of the Wackenhut-UPG agreement. Stressing the fundamentality of the freedom of contract principle in the national labor laws, *see generally* Howard K. Porter Co. v. NLRB, 1970, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146, the Court emphasized that

the existence of a duty to bargain did not enable the Board to bind either side to agree to any particular term of contract. The Board argued that the interests in the "peaceful settlement of industrial conflicts and 'protection [of] the employees [against] a sudden change in the employment relationship" 406 U.S. at 285, 92 S.Ct. at 1581, 32 L.Ed.2d at 72, recognized in *Wiley* "require that Burns be treated under the collective-bargaining contract exactly as Wackenhut would have been if it had continued protecting the Lockheed plant." *Id.* The Court found the *Wiley* case distinguishable, however, on two grounds.[10]

First, *Wiley* held only that the agreement to arbitrate survived the merger there, and left for the arbitrator to decide, subject to judicial review, the extent to which the successor employer was bound by the remaining provisions of the predecessor's collective bargaining agreement. In *Burns*, however, arbitration was not in issue, and the interest in labor stability was insufficiently substantial to outweigh the policy against governmental imposition of specific contract terms. Second, the *Burns* Court distinguished the predecessor-successor relationship in the *Burns* annual rebidding situation from that in *Wiley*, which involved

> a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation. . . . Here there was no merger or sale of assets, and there were no deal-

[10] The Court also distinguished the posture in which each case was presented. *Wiley* was a § 301 action, while *Burns* arose "in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of § 8(d)," from requiring that any party "agree to a proposal or . . . [make] a concession, see H. K. Porter Co. v. NLRB," 406 U.S. at 285, 92 S.Ct. at 1581, 32 L.Ed.2d at 72. The Court has subsequently minimized the importance of this consideration, however, *see* Howard Johnson, — U.S. at —, 94 S.Ct. at 2240, 41 L.Ed.2d at 53. *See also* The Supreme Court, 1972 Term, 82 Harv.L.Rev. 50, 255-56 (1972).

> ings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union . . . . But this consideration is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining contract.

406 U.S. at 286-287, 92 S.Ct. at 1581, 32 L.Ed.2d at 72.

Whatever the possibility of distinguishing the precise holdings of the two cases, however, there remains a fundamental difficulty in reconciling their approaches, as we have remarked elsewhere, United Steelworkers v. United States Gypsum Co., 5 Cir. 1974, 492 F.2d 713, 725 n. 20, and as the Supreme Court has itself subsequently observed, *Howard Johnson*, — U.S. at —, 94 S.Ct. at 2239-2241 L.Ed.2d at 52-53. *Wiley's* expansive approach to the reach of a collective bargaining agreement remains in stark contrast to the *Burns* Court's emphasis on traditional principles of consent to be bound by contract, which emphasis culminated in the statement that "[s]trife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties." 406 U.S. at 288, 92 S.Ct. at 1582, 32 L.Ed.2d at 73.

The Supreme Court has not yet found it necessary to resolve these differences in approach. We are confident, however, that even at the most *Burns* has not overruled the principles of *Wiley*. *See e. g.*, Golden State Bottling Co. v. NLRB, 1973, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (a post-*Burns* case applying principles of *Wiley* in enforcing an NLRB unfair labor practice remedy against successor employer, where it had notice of predecessor's unfair labor

practice litigation); *see* United Steelworkers v. United States Gypsum Co., 5 Cir. 1974, 492 F.2d at 725-726.

The matter at bar resembles both *Wiley* (in that the remedy sought is an arbitration order under § 301) and *Burns* (in that the link between the predecessor and successor is the tenuous one of replacement under a periodic rebidding service contract arrangement). While we need not determine the precise remaining vitality of *Wiley's* reach, we are required to measure its application to the matter at hand, in light of the approach more recently adopted by the Supreme Court. In this effort we extract some guidance from the Court's most recent discussion of these issues in *Howard Johnson, supra.* There Howard Johnson leased the real property and purchased the remaining assets of a restaurant and motor lodge of one of its franchisees, and proceeded to operate the unit itself. Determining to establish its own work force, Howard Johnson hired 45 employees, only 9 of whom had been its former franchisee's personnel. The union which had represented the former franchisee's work force and entered into a collective bargaining agreement with the former franchisee brought a § 301 action to compel arbitration under the predecessor's bargaining agreement; its principal grievance was that Howard Johnson was obligated under that contract to continue the employment of all the franchisee's employees because they had not been discharged in accordance with the terms of the union-franchise contract.

While the *Howard Johnson* Court explicitly declined to resolve the differences between *Wiley* and *Burns,* it did make three points significant here. First, it established that *Wiley* should be read restrictively, as a "guarded, almost tentative statement," — U.S. at —, 94 S.Ct. at 2240, 41 L.Ed.2d at 53. Second, it held that even under *Wiley* the arbitration sought could not be ordered because of the lack of "substantial continuity of identity in the business enterprise," which requirement it read to include a showing of a "substantial continuity in the identity of the work

force across the change in ownership." — U.S. at —, 94 S.Ct. at 2241, 41 L.Ed.2d at 57. Third, the Court articulated the balance which must be struck in determining whether an employer is obliged to fulfill any given obligation of "successorship":

> The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others.

— U.S. at — n. 9, 94 S.Ct. at 2243, 41 L.Ed.2d at 56-57.[11]

B

Substantial Continuity in the Identity of the Business Enterprise

The Supreme Court opinions are consistent on the one proposition that there is no simple checklist for decision; none could exhaust the factors relevant to determining whether a successor employer is bound to arbitrate under

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[11] The *Howard Johnson* Court also concluded that even were arbitration required of Howard Johnson, hiring of predecessor employees could not be, since it determined that the requirement of hiring any particular one or number of a predecessor's employees to be "completely at odds with the basic principles [of employer freedom to contract which] this Court elaborated in Burns." — U.S. at —, 94 S.Ct. at 2243, 41 L.Ed.2d at 56. In light of the way in which we resolve this case, we need not consider this phase of the *Howard Johnson* opinion.

its predecessor's contract. We are in essence called upon to pragmatize the corporate and labor relationships to determine whether the past is part of the present, or the present the beginning of tomorrow. In a given case it may be clear that some one indicator of continuity is so weak as to allow a simple conclusion of no duty to arbitrate; but in more closely balanced cases, ownership, contracts terminated and germinated, purity and impurity of motives, and an encyclopedia of other variables must be equiponderated. We conclude here that despite the fact that there is no doubt on this record that Boeing has pursued its business in a manner substantially congruent to TWA's patterns,[12] Boeing cannot be ordered in this § 301 action to arbitrate IAMAW's grievances under the TWA-IAMAW contract, given (1) the extent of the continuity in the identity of the work force across the change in employers, and (2) the relation between Boeing and TWA themselves.

Continuity in the Identity of the Work Force

Howard Johnson establishes that "continuity of identity in the business enterprise necessarily includes . . . a substantial continuity of identity of the work force across the change in ownership." —— U.S. at ——, 94 SCt. at 2244, 41

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[12] *Wiley, supra;* Note, The Successor Employer's Duty to Arbitrate: A Reconsideration of John Wiley & Sons, Inc. v. Livingston, 82 Harv.L.Rev. 318, 341 (1968). *See* Wackenhut Corp. v. International, etc., Plant Guard Workers, 9 Cir. 1964, 332 F.2d 954. *See also e.g.,* United States Gypsum Co. v. United Steelworkers, 5 Cir. 1967, 384 F.2d 38, 41, cert. denied, 1968, 389 U.S. 1042, 88 S.Ct. 783, 19 L.Ed.2d 832; United Steelworkers v. Reliance Universal, 3 Cir. 1964, 335 F.2d 891, 893; Joint Bd. etc., Dressmakers Union v. Senco, Inc., D.Mass.1970, 310 F.Supp. 539, 544; Retail Clerks Union Local No. 1552 v. Lynn Drug Co., S.D. Ohio, 1969, 299 F.Supp. 1036, 1039-1040; International Bhd. Pulp, etc., Workers v. Great Northwest Fibre Co., E.D.Wash., 1965, 263 F.Supp. 167, 169; Local Joint Exec. Bd., Hotel, etc., Employees v. Joden, Inc., D.Mass., 1966, 262 F.Supp. 390, 396.

L.Ed.2d at 46.[13] We do not think that any precise definition of "substantiality" in work force continuity can be distilled from the particular language of *Howard Johnson*, however. The Court found support for its "substantial" standard in the "wholesale transfer" of employees from predecessor to successor in *Wiley*[14] and from "the emphasis most of the lower courts have placed on whether the successor employer hires a majority of the predecessor's employees in determining the legal obligations of the successor in § 301 suits under Wiley" —— U.S. at ——, 94 S.Ct. at 2244, 41 L.Ed.2d at 46. We believe that these statements in *Howard Johnson* are descriptive rather than prescriptive and do not, in themselves, establish any "majority" criterion, such as Boeing argues in favor of here.[15] IAMAW argues in the other direction that the Supreme Court's enunciation of a "substantiality" test when it might have adopted a "majority" standard establishes that a "majority" employee continuity cannot be prerequisite to a duty to ar-

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[13] There is no suggestion, however, that retention of a predecessor's employees is in itself a sufficient basis on which to found an obligation under § 301 to arbitrate; if, for example, a successor employer radically changed the type of product manufactured and the ways of doing business of a plant and retained the former employer's personnel solely in order to preserve stability in the local economy, we expect that the successor would not be obliged to arbitrate under his predecessor's contract.

[14] *But see* note 11 *supra*.

[15] None of the cases cited in the *Howard Johnson* opinion (save the district court opinion in the matter *sub judice*, which we determine in any event to have the product of a misapprehension of *Burns*) articulates a general standard for the quantum of employee continuity prerequisite to an order to arbitrate under a predecessor's contract. Indeed, in one of the cited cases, Local Joint Exec. Bd., Hotel, etc., Employees v. Joden, Inc., D.Mass.1966, 262 F.Supp. 390, a duty to arbitrate was found despite the fact that (contrary to the Supreme Court's apparent reading of the case) a majority of the predecessor's employees were *not* retained by the successor (12 of "29 or 30" were retained).

bitrate. We find this argument as unimpressive as its rejected converse. Rather, we regard the Supreme Court's emphasis in *Howard Johnson* of the necessity for pursuing a "traditional case-by-case approach" in this area, —— U.S. at ——, 94 S.Ct. at 2240, 41 L.Ed.2d at 53, as an assurance that it intended to establish no precise benchmark at this stage in the law's development, even assuming that a strict standard would ever be appropriate.

Computation of Continuity in the Identity of the Work Force

Boeing argues, and IAMAW denies, that even if the Supreme Court has not committed itself to any precise definition of "substantiality," case law from the lower courts establishes "majority status" as the test of substantial continuity in the identity of the work force. Before addressing the appropriateness of a "majority" standard, we consider what group it is that this "majority" is to be computed from: that is, whether the more significant factor in determining the continuity in the identity of the work force for the purpose of determining whether a successor employer must arbitrate under its predecessor's contract is the percentage of the predecessor's employees who have continued to work for the successor, or whether it is the percentage of the successor's employees who had earlier worked for the predecessor.[16]

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[16] The differences between the two majorities are illustrated by the facts of Local Joint Exec. Bd., Hotel, etc., Employees v. Joden, Inc., D.Mass.1966, 262 F.Supp. 390, 392: "Prince [the predecessor] was employing twenty-nine or thirty people. Of these thirty, Joden [the successor] retained twelve to make a total complement of eighteen or nineteen people working for Joden . . . ." Thus, the percentage of the predecessor's employees who remained at the restaurant was 12/30 = 40%; while the percentage of the successor's employees who had been working for the predecessor was 12/18 or 12/19 = 67% or 63%.

The parties here have debated the substantiality of the continuity in the identity of the work force largely in terms of the 39% of Boeing's employees who had worked for TWA. We conclude, however, that the percentage of TWA employees who became Boeing employees, which we determine to be about 35%, is the more significant figure in considering whether Boeing is obliged to arbitrate under the TWA-IAMAW contract.

To begin with, the showing of employee continuity is relevant in establishing "the continuity of identity in the business enterprise." As a matter of principle, since the duty to arbitrate arises from an application of the contract between the predecessor employer and his organized employees, the entity whose identity is to be the reference point for judging continuity ought to be the predecessor enterprise. Accordingly, in judging the continuity in the identity of the work force, the incumbent component of the successor's work force ought to be compared against the predecessor's staff, not the successor's.[17]

This method of computation is consistent with the Supreme Court's opinions. In *Wiley* the Court required arbitration where the predecessor's employees comprised a much smaller percentage of the successor's employees after the merger (40 of 340=11%) than the corresponding ratio in *Howard Johnson* (9 of 45=20%), in which no ar-

[17] Additionally, the percentage representing those of the predecessor's employees who were retained by the successor decreases according to the successor's trimming of his total work force, while the figure representing the percentage of the successor's employees who are incumbents increases as the size of the successor's total work force diminishes. (Where the total employee complement is the same under both predecessor and successor the percentages will be equal.) Since a net decrease in the total number of personnel indicates a lesser continuity in the identity of the business enterprise, the percentage of the predecessor's employees remaining with the successor seems a better general indicator of the enterprise continuity.

bitration was required. Rather, the *Howard Johnson* Court found it most significant that "in *Wiley* the surviving corporation *hired all of the employees of the disappearing corporation,*" ——U.S. at ——, 94 S.Ct. at 2241, 41 L.Ed.2d at 54 (emphasis altered). Moreover, it found support for its conclusion in what it perceived to be "the emphasis most of the lower courts have placed . . . in determining the legal obligations of the successor in § 301 suits under Wiley" on the percentage of the predecessor's employees hired by the successor employer, —— U.S. at ——, 94 S.Ct. at 2244, 41 L.Ed.2d at 57.

Thus, while the figure most significant in determining the successor's duty under *Burns* to bargain with the union representing the predecessor's organized employees may be[18] the percentage of the successor's employees who are incumbents from the predecessor, *see e.g., Burns,* 406 U.S. at 279, 92 S.Ct. at 1577, 32 L.Ed.2d at 68; Emerald Maintenance, Inc., 5 Cir. 1972, 464 F.2d 698, 701; Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw. U.L. Rev. 735, 793-794 (1969), we find those cases—where the basic question to be resolved by examination of employee continuity is simply whether the union represents a

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[18] The cases do not always consider which ratio is most significant. *See* Note, Contrary Rights and the Successor Employer: The Impact of *Burns Security*, 71 Mich.L.Rev. 571, 575 n. 35 (1973). *Compare Burns,* 406 U.S. at 281, 92 S.Ct. at 1579, 32 L.Ed.2d at 68 ("a majority of the employees hired by the new employer") *with* the Supreme Court's later recitation of *Burns,* Golden State Bottling Co. v. NLRB, 414 U.S. at 184 n. 6, 94 S.Ct. at 425, 38 L.Ed.2d at 402 ("a majority of [the predecessor's] employees"). No doubt a large part of this obscurity is owing to the fact that in the case—probably the usual case—where the predecessor and successor employ the same number of personnel or close to the same number, the figures will be the same or close, so that it does not matter which figure is consulted. *See, e.g.,* NLRB v. Zayre Corp, 5 Cir. 1970, 424 F.2d 1159; NLRB v. Wayne Convalescent Center, Inc., 6 Cir. 1972, 465 F.2d 1039; NLRB v. Interstate 65 Corp., 6 Cir. 1971, 453 F.2d 269, 273.

majority of the successor's employees, *see Burns*, 406 U.S. at 278-281, 92 S.Ct. at 1577-1579, 32 L.Ed.2d at 68-69; NLRB v. Auto Ventshade, Inc., 5 Cir. 1960, 276 F.2d 303, 307—unpersuasive examples in this context.[19]

Regarding "Majority" Work Force Continuity

Having established the reference point from which to compute the ratio of substantial continuity in identity of the work force, we turn to the substance of the question: whether the fact that Boeing hired only about 35% of the incumbent TWA work force determines that Boeing is not obligated to arbitrate under its predecessor's contract.

We are not prepared at this point in the development of the law of successor employers' obligations to arbitrate either to accept or to reject Boeing's argument that "majority status" is prerequisite to the obligation to bargain. In the first place, as we have already expressed, we do not find that the Supreme Court has established any benchmark. Furthermore, we are convinced that reliance on bargaining cases, such as *Burns*, is misplaced. There is much, though not unanimous, authority for the proposition that a successor employer will be required to bargain with the union representing his predecessor's employees only when predecessor's personnel comprise a majority of the successor's work force.[20] But the federal labor law polices

[19] Our conclusion as to which ratio is more significant in determining whether a successor is obliged to arbitrate does not, of course, preclude all consideration of the other ratio. For example, an arbitrator may consider that the work force of an absorbed enterprise has been diffused in such a way as to preclude the application of the predecessor's collective bargaining agreement. *See Howard Johnson*, — U.S. at —, n. 4, 94 S.Ct. at 2241, 41 L.Ed.2d at 54.

[20] The *Burns* opinion speaks in inclusive, not exclusive, terms, holding that "where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little

underlying such conclusions are analytically distinct from those involved in successorship arbitration suits under § 301. The majority requirement in duty to bargain cases is premised upon notions of majority selection of organized employees' collective bargaining agents. In the duty to arbitrate cases under § 301, however, the incumbent employees fulfill no such representative function in the filing of their grievances.[21] Thus, in *Wiley* the Supreme Court noted that its finding of Wiley's duty to arbitrate did "not suggest any view on the questions surrounding a certified union's claim to continued representative status. This union . . . seeks to arbitrate claims based on [its contract with the predecessor employer], not to negotiate a new agreement," and stated that "[t]he fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises." 376 U.S. at 551 and n. 5, 84 S.Ct. at 915, 11 L.Ed.2d at 905. To the same effect, we have upheld a successor employer's duty to arbitrate with a union which had once represented the predecessor's employees, but lost its certification.

basis for faulting the Board's" ordering the employer to bargain. 406 U.S. at 281, 92 S.Ct. at 1579, 32 L.Ed.2d at 69. Nevertheless, it is clearly established by the vast majority of cases that the Board will generally impose a duty to bargain only where a majority of the successor's personnel are incumbents from the predecessor work force. *See generally* Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw.U.L.Rev. 735, 793-799 (1969); Note, *supra* note 20, 71 Mich.L.Rev. at 575 n. 38. *See also* Emerald Maintenance, Inc. v. NLRB, 5 Cir. 1972, 464 F.2d 698, 670. A majority, while necessary, is not necessarily sufficient, however, *see* cases summarized in Slicker, A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach, 57 Minn.L.Rev. 1051, 1055 n. 15 (1973).

[21] Indeed, this distinction is evident in the differences in the reference points from which the relevant majority of employees requisite to establishment of the employer's duty are to be computed.

United States Gypsum Co. v. United Steelworkers, 5 Cir. 1967, 384 F.2d 38, 47.

For the purpose of resolving this case, however, we need not decide whether the principles underlying the *Howard Johnson* requirement of a substantial continuity in the work force is to be read as a generally applied "majority" standard.[22] We conclude only that the continuity in the identity of the work force must be considered together with other indicia of enterprise continuity, and turn to a consideration of those factors.

Nature of the TWA-Boeing Relationship

It is well established that the principle of *Wiley* applies to corporate successorships accomplished through purchase

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[22] We have discovered no case (save the district court opinion below) holding that successor employer's retention of a majority of its predecessor's personnel is prerequisite to the finding of a duty to arbitrate under the predecessor's contract. *But cf. Howard Johnson*, — U.S. at — and n. 10, 94 S.Ct. at 2244, 41 L.Ed.2d at 57; Retail Clerks Union Local No. 1552 v. Lynn Drug Co., S.D.Ohio 1969, 299 F.Supp. 1036. One case has ordered arbitration despite the successor's taking only a minority of the predecessor's employees, Local Joint Exec. Bd., Hotel, etc., Employees v. Joden, Inc., D.Mass.1966, 262 F.Supp. 390. *See also* Monroe Sander Corp. v. Livingston, 2 Cir. 1967, 377 F.2d 6, cert. denied, 1967, 389 U.S. 831, 88 S.Ct. 97, 19 L.Ed.2d 89; *but see also* Printing Specialties, etc., Union No. 447 v. Pride Papers Aronson Bros. Paper Corp., 2 Cir. 1971, 445 F.2d 361, 364 n. 1, cert. denied, 1971, 404 U.S. 1001, 92 S.Ct. 564, 30 L.Ed.2d 553; Owens-Illinois, Inc. v. District 65, Retail, etc., Store Union, S.D.N.Y.1967, 276 F.Supp. 740, 743, aff'd on district court opinion, 2 Cir. 1968, 393 F.2d 932. *Cf. also* International Bhd., Pulp, etc., Workers v. Great Northwest Fibre Co., E.D.Wash. 1965, 263 F.Supp 167, 168 ("significant number of former employees"). Some commentators argue that a majority need not be required, *see* Goldberg, *supra*, note 22, at 750 n. 52; Note, *supra*, note 14, at 430. *But see* Note, Contractual Successorship: The Impact of *Burns*, 40 U.Chi.L.Rev. 617, 621 n. 20 (1973), cited with approval, *Howard Johnson*, — U.S. at —, n. 10, 94 S.Ct. at 2244, 41 L.Ed.2d at 57.

and sale rather than merger.[23] We consider here the extent to which the *Wiley* test of continuity in the identity of the business enterprise can be satisfied in a periodic rebidding service contract context—"hardly . . . a typical successorship situation."[24]

We begin by distinguishing the cases finding sufficient continuity in the "employing industry"[25] to support a duty to recognize and bargain with the predecessor employees' union in such a context.[26] The focus in these duty to bargain cases being whether "the unit still represent[s] a majority of the employees," Burns, 406 U.S. at 278, 92 S.Ct. at 1577, 32 L.Ed.2d at 68, the primary consideration is naturally the work force continuity. *See generally* Goldberg, *supra* note 22, at 793-799. As a secondary matter, attention is given to whether the successor's "operational structure and practices differed from those of [the predecessor, so that the successor's] bargaining unit was no longer an appropriate one." *Burns*, 406 U.S. at 280, 92 S.Ct. at 1578, 32 L.Ed.2d at 68. See Emerald Maintenance Inc. v. NLRB, 5 Cir. 1972, 464 F.2d 698, 701-702. *See, e.g.*,

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[23] *See* Golden State Bottling Co. v. NLRB, 1973, 414 U.S. at 182, n. 5, 94 S.Ct. at 424, 38 L.Ed.2d at 402; United States Gypsum Co. v. United Steelworkers, 5 Cir. 1967, 384 F.2d 38, 43-44, cert. denied, 1968, 389 U.S. 1042, 88 S.Ct. 783, 19 L.Ed.2d 832.

[24] St. Antoine, Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971, U.Mich.J.L.Ref. 269, 270 (1973).

[25] *See* Golden State Bottling Co. v. NLRB, 414 U.S. at 182 n. 5, 94 S.Ct. at 424, 38 L.Ed.2d at 402; Emerald Maintenance, Inc. v. NLRB, 5 Cir. 1972, 464 F.2d 698; NLRB v. Zayre Corp., 5 Cir. 1970, 424 F.2d 1159; NLRB v. Auto Ventshade, Inc., 5 Cir. 1960, 276 F.2d 303; NLRB v. Colten, 6 Cir. 1939, 105 F.2d 179, 183.

[26] *See, e.g., Burns*, 406 U.S. at 278-281, 92 S.Ct. at 1577-1579, 32 L.Ed.2d at 67-69; Emerald Maintenance, Inc. v. NLRB, 5 Cir. 1972, 464 F.2d 698. *See also, e.g.*, NLRB v. Geronimo Service Co., 10 Cir. 1972, 467 F.2d 903; Maintenance, Inc., 1965, 148 N.L.R.B. 1299; *see generally* Slicker, *supra* note 22, at 1062-1063. *Cf. also* Eastman Kodak Co., 1971, 194 NLRB No. 27.

NLRB v. Alamo White Truck Service, 5 Cir. 1959, 273 F.2d 238. *See generally* Goldberg, *supra* note 22, at 799-806. Thus, the nature of the predecessor-successor relationship is of relatively minor significance.

In the duty to arbitrate context, however, it is the continuity in identity of the *enterprise* which makes the duty to arbitrate under the predecessor's collective bargaining agreement "reasonably related to the party sought to be obligated," and not "something imposed from without," *Wiley*, 376 U.S. at 550-551, 84 S.Ct. at 915, 11 L.Ed.2d at 905; and the "continuity in the identity of the work force across the change in ownership" constitutes only a necessary but insufficient part of the enterprise continuity. *Howard Johnson*. Thus we think the relationship between the predecessor and successor employers far more critical here than in the duty to bargain cases.

While we recognize that the Supreme Court spoke in *Howard Johnson* of substantial continuity in the identity of the work force across the change in *ownership*, we do not regard that oblique reference as a conclusion that a successor's duty to arbitrate under § 301 depends on a merger or purchase and sale connection between the predecessor and successor. Nor do we think that the *Burns* majority's "studious" avoidance of the term "successor,"[27] while a significant gesture, should be taken to conclude the Supreme Court's thinking on the matter. More important, however, is the *Burns* Court's emphasis of the tenuous quality of the enterprise continuity in denying the application of substantive contract terms in *Burns:*

> Wiley['s] . . . [narrow] holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the

[27] *See* 406 U.S. at 296, 92 S.Ct. at 1586, 32 L.Ed.2d at 78 (Rehnquist, J.).

> surviving corporation is liable for the obligations of the disappearing corporation. . . . Here there was no merger or sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union . . . . But this consideration is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective bargaining contract.

406 U.S. at 286, 92 S.Ct. at 1581, 32 L.Ed.2d at 72.[28] This factor was not, however, the critical basis of *Burns* conclusion that the service contract there was not bound to the terms of its predecessor's contract. Indeed, commentators have stressed that the most significant consideration in the Supreme Court's conclusion was the inflexibility of the nonarbitrated enforcement of the precise and entire substance of the predecessor's contract through the NLRB's mechanisms.[29] Nevertheless, we recognize that continuity in the identity of the business enterprise is more strongly shown where the predecessor employer-

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[28] *Cf. also* Tri-State Maintenance Corp. v. NLRB, 1968, 132 U.S. App.D.C. 368, 408 F.2d 171.

[29] *See generally* Note, *supra* note 20, at 576-579; Note, *supra* note 12, at 256-258; Note, *supra* note 24, at 624-631. *But see* St. Antoine, *supra* note 26, at 273-276. This was substantially the difficulty recognized by the Labor Board in Emerald Maintenance, Inc., 1971, 188 N.L.R.B. 876, 878, enforced in part, 5 Cir. 1972, 464 F.2d 698, in which, prior to *Burns*, it questioned the applicability in some circumstances of its own doctrine of applying contractual terms against a successor employer in the periodic rebidding context.

successor employer relationship is one of purchase and sale, or merger, than in this replacement-under-periodic-rebidding situation.

We are not prepared at this stage in the development of successorship principles, however, to say—when we need not do so to resolve this case—that there cannot be "any substantial continuity of identity in the business enterprise" in the absence of a transfer of ownership of tangible assets between employers, even when the most substantial assets involved in both the predecessor and successor enterprises may be the relationship to the primary employer and the collection of the work force, both of which have passed from the predecessor to the successor employer.[30] Rather, in keeping with the case-by-case approach the Supreme Court has advised, we conclude at this time only that where the relationship between the predecessor and successor employers is one of replacement in the periodic rebidding context, so that demonstration of continuity in the identity of the enterprise depends completely upon the continuity of the employee complement, the continuity in the identity of the work force must be more substantially established than would be required were the relationship between the predecessor and successor employers one of merger, or purchase and sale.

This conclusion is consistent with the *Howard Johnson* Court's injunction that *Wiley* ought to be expanded only with caution, and with the *Wiley* Court's balancing of employee interests in protection from "a sudden change in the employment relationship" (which exists regardless of the form of employer substitution), against the "rightful prerogative of owners independently to rearrange their business." 376 U.S. at 549, 84 S.Ct. at 914, 11 L.Ed.2d at

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[30] *Compare* St. Antoine, *supra* note 26, at 273, *with* Goldberg, *supra* note 22, at 748-750.

904.[31] We regard the substantiality of continuity from neither the employers' nor the employees' standpoint alone.[32]

Conclusion

We hold, then, that given the nature of the relation between TWA and Boeing, the extent of the continuity in the identity of the work force established here is not sufficiently substantial to oblige Boeing under § 301 to arbitrate under its predecessor's contract. *Howard Johnson*, — U.S. at —, 94 S.Ct. at 2244, 41 L.Ed.2d at 58. *Cf.* Hoisting, etc., Eng'rs Local, etc., 701 v. Pioneer Constr. Co., D.Or.1970, 313 F.Supp. 753.[33] In this conclusion we do not pretend to

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[31] There may also be third party interests at stake in this periodic rebidding service contract context: those of the primary employer. It is not clear, however, that those interests cannot be adequately protected through the flexible mechanisms of arbitration or otherwise. Furthermore, to hold that a successor in this context is never bound to arbitrate may be to interfere with the bidding process iself by establishing a favored competitive position for any outsider. Of course the lack of sufficient notice of preexisting collective bargaining agreement may free a successor employer in this context from any duty under its predecessor's contract. *See Wiley*, 376 U.S. at 551, 84 S.Ct. at 915, 11 L.Ed.2d at 905.

[32] *See Howard Johnson*, — U.S. at —, n. 9, 94 S.Ct. at 2243, 41 L.Ed.2d at 56-57; Retail Store Employees Union Local No. 954 v. Lane's of Findlay, Inc., N.D.Ohio 1966, 260 F.Supp. 655, 659; Drivers, etc., Local No. 75 v. Wisconsin Employment Relations Bd., 1965, 29 Wis.2d 272, 279, 138 N.W.2d 180, 184.

[33] IAMAW argues against this conclusion that to determine the continuity of identity of the work force, as we have done, by reference to the quantum of employees who actually were hired by Boeing, rather than by the number who would have signed on with Boeing had Boeing initially offered a contract identical to TWA's, is incorrect, since it allows Boeing to avoid the contract in the end by simply ignoring it in the beginning. We are not convinced. We do not think that a successor in Boeing's shoes can be required to assume its predecessor's contract even before it is established

have harmonized the law; such would be beyond the range of any single opinion, given the variety of relevant factors. We have simply improvised a tune with which to develop the established themes, and followed past scores to avoid discord.

III

Check-Off Provision

The District court ordered Boeing to turn over to IAMAW (with interest) the union dues of its IAMAW-

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that it will succeed in lacing up its predecessor's work force. Burns, 406 U.S. at 287-288, 92 S.Ct. at 1582-1583, 32 L.Ed.2d at 73. Moreover, the rationale behind the requirement of demonstrating a substantial continuity in the identity of the work force in order to make out a case of substantial continuity of the enterprise is, as we have understood it, to establish that an employer's *securing* the continuity in the work force is a factor to be considered in determining the continuity of the enterprise. It is quite apparent that Boeing did not ultimately secure a sufficiently substantial continuity of the work force here, although at one point Boeing expected to inherit the bulk of TWA's staff and undoubtedly it thought it could benefit from having the experienced personnel. Nor is there any suggestion in this case that Boeing discriminated against TWA incumbents, as the opinion below makes clear, 351 F.Supp. at 815. *See generally Howard Johnson*, — U.S. at —, n. 8, 94 S.Ct. at 2243, 41 L.Ed.2d at 56; *Burns*, 406 U.S. at 280 n. 5, 92 S.Ct. at 1578, 32 L.Ed.2d at 69. We hold that where, as in the circumstances of this case, the employee complement is perhaps the prime identity link between the successor and predecessor employers, a successor employer cannot be forced under § 301 to arbitrate under its predecessor's contract when the successor did not take the necessary steps to secure his enjoying, and consequently did not enjoy, a sufficiently substantial continuity in the identity of the work force.

In light of this conclusion, we need not consider the relevance, if any, to the resolution of IAMAW's rights against Boeing, of the continuing existence of TWA. *Cf.* Goldberg, *supra* note 22, at 754-755; *but cf. also Howard Johnson*, — U.S. at —, 94 S.Ct. at 2241, 41 L.Ed.2d at 54. Nor need we consider Boeing's argument that since the TWA-IAMAW contract's arbitration clause was designed to conform to the mechanisms of the Railway Labor Act, it could not be applied against Boeing.

member employees which Boeing had checked-off and escrowed.[34] Boeing cross-appeals this part of the district court's order, arguing that where there is no collective bargaining agreement applicable to Boeing (1) that it is not obligated to deduct dues for the benefit of IAMAW, and (2) that to remit any such check-off dues to IAMAW violates § 302(a) of the Labor Management Relations Act, 29 U.S.C. § 186(a).[35]

We need not consider the correctness of Boeing's legal conclusions here, however, for we determine that its premise is unsupported; we find that there is a labor contract applicable to Boeing. Boeing contends that the Boeing-IAMAW agreement is controlling." Reply Brief for Plaintiff-Appellee-Cross Appellant at 4. IAMAW contends that if

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[34] The district court also ordered

> IAM[AW] and Local Lodge 2061 [to] deliver simultaneously with the payments . . . a hold harmless and indemnity agreement, wherein each . . . agrees to indemnify and hold Boeing harmless from any losses by Boeing because of the payment to Lodge 2061 of the escrowed dues arising from a final finding that IAM[AW] was not the collective bargaining agent for the employees from whom such dues were collected.

351 F.Supp. at 816-817. This part of the order is not in controversy.

[35] Section 302(a) generally prohibits payments by an employer to a labor union. Section 302(c)(4) provides, however, that that general prohibition

> shall not be applicable . . . with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner . . . .

Boeing's argument is that this exception to § 302(a) does not apply, because the proviso is unsatisfied.

the TWA-IAMAW contract does not control here, then the Boeing-IAMAW contract does. The district court correctly observed that " there is no evidence that anyone has challenged IAM[AW] as the collective bargaining agent for the Boeing support services employees—the whole dispute has centered around *which contract* was applicable. 351 F.Supp. at 816. With our holding here that Boeing is obliged neither to adhere to nor to arbitrate under the TWA-IAMAW collective bargaining agreement, that dispute is resolved, and Boeing's argument is left without any foundation.

The judgment and order entered below are

Affirmed.

II.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 71-96-ORL-CIVIL

Filed Orlando, Fla. Oct. 16, 1972
Wesley R. Thies, Clerk

THE BOEING COMPANY,

Plaintiff,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al.,

Defendants.

Order

The Boeing Company (Boeing) brought this suit against the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), District Lodges 142 and 166 of IAM and Local Lodges 773 and 2061 of IAM seeking a declaratory judgment as to the applicability of a collective bargaining agreement to the plaintiff under Section 301 of the Labor-Management Relations Act, as amended, (the Act).[1] Jurisdiction of this Court under 29 U.S.C. 185(c) is conceded by all parties and is found to exist by this Court.

The defendants filed their answer and a counterclaim seeking a holding by this Court that Boeing was bound by the agreement in dispute and that Boeing is obligated to submit to arbitration any claims of IAM that Boeing has violated the agreement.

The case was submitted on cross motions for summary judgment with each side agreeing that for the purposes of this case there are no disputed material issues of fact

[1] 29 U.S.C. 185(a).

so that the case can and should be determined by application of the law to the admitted facts. Briefs were filed, oral arguments heard and, then at the request of counsel, disposition was stayed to await the decision of the Supreme Court in *N.L.R.B.* v. *Burns*, 406 U.S. 272, decided May 15, 1972. Thereafter supplemental briefs were filed as to the effect of the *Burns* decision on the case at bar.

The facts are that until April 1, 1971 Trans World Airlines, Inc. (TWA) had a contract with the National Aeronautics and Space Administration (NASA) for support services [2] for NASA at the Kennedy Space Center, Florida. In 1970 Boeing successfully bid for a new contract with NASA to perform the support services which had been rendered by TWA. On April 1, 1971, Boeing commenced full performance under its contract with NASA.

The TWA contract with NASA had run from March 9, 1964 through March 31, 1971. TWA had employed about 1,100 persons to perform the support services other than guard, fire, janitorial and training services which were subcontracted by TWA to other firms. The 1,100 TWA nonsupervisory employees were represented in collective bargaining by IAM which had in force at the time of the expiration of TWA's contract with NASA a collective bargaining agreement with TWA entered into on January 28, 1970 which was to remain in full force and effect to and including December 31, 1971.

TWA, an air carrier, had had a nation-wide collective bargaining agreement already in force and when in 1964 TWA secured the NASA support services contract, a supplemental agreement was entered into between TWA and IAM on February 17, 1964 bringing the Kennedy

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[2] Included such services as test support management, plant engineering and maintenance, logistics operations, mail and postal distribution, janitorial services, fire prevention and protection services, quality assurance, and security services.

Space Center TWA employees under the nation-wide TWA-IAM agreement. That agreement—subject to the Railway Labor Act—was apparently extended to the non-carrier space center employees of TWA by action of TWA and IAM without any vote of preference by the non-carrier employees. District Lodge 142 and Local Lodge 773 of IAM are the subordinate units of IAM which aided in the administering of the TWA-IAM agreement covering the space center employees.

Prior to its securing the service contract, Boeing had been performing mission launch support services known as "hardware contracts".[3] These services were separate and different from the installation support services performed by TWA prior to April 1, 1971, and after that date by Boeing. There were about 287 employees of Boeing working on the hardware contracts and they were also represented by IAM in collective bargaining pursuant to a nation-wide agreement between Boeing and IAM entered into October 2, 1968 and continuing through October 1, 1971. The subordinate units of IAM which aided in the administering the Boeing-IAM agreement for the space center Boeing hardware contracts employees were District Lodge 166 and Local Lodge 2061.

The wages and fringe benefits provided by the TWA-IAM collective bargaining agreement were higher than those provided by the Boeing-IAM agreement and therein lies the reason for the controversy at bar.

When Boeing first learned that it would get the contract for support services commencing April 1, 1971, it delivered over 1,000 job application forms to TWA's Industrial Relations office for dissemination to TWA employees. Boeing offered evidence that IAM officials—International and

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[3] These included such services as the production of the first stage of the Saturn V launch vehicle, structural work on the launch vehicle tower, high pressure gas system connections and electrical connections to the Saturn V rocket.

local—had discouraged TWA support service employees from seeking employment with Boeing and for that reason by April, 1971, of the approximately 1,000 Boeing employees hired to perform under the support services contract less than 400 were formerly TWA employees. At first in the course of this suit the defendants contested that position of the plaintiff and contended there was discrimination by Boeing in its hiring. However, in its brief filed July 3, 1972, IAM withdrew for the purposes of this case that contention. On page 10 of the brief counsel stated:

> "... we now withdraw, for the purpose of this proceeding only, any claim that Boeing purposely populated it work force with a minority of TWA incumbents in order to avoid the status of successor. We choose in this proceeding to stand or fall on our position that Boeing is a successor independently of any claim that it hired discriminatorily to escape successorship."

In this case the defendants have relied heavily on *John Wiley & Sons, Inc.* v. *Livingston*. 376 U.S 543 (1964) to establish Boeing as the successor of TWA and thereby bound to the TWA contract with IAM. But the *Burns* case has clarified the *Wiley* decision, p. 286:

> "Its (Wiley) narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation."

Boeing and TWA did not merge; they were rivals competing for a contract which resulted in Boeing securing the contract and employing a majority of non-TWA former employees. In *Burns* (which replaced Wackenhut's protective services at a Lockheed California plant) more than a majority of Wackenhut's employees were employed by Burns. The Court said, p. 279:

> "... It has been consistently held that a mere change of employers or of ownership in the employing

> industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period *if a majority of employees after the change of ownership or management were employed by the preceding employer.*" (Emphasis added)

Burns held that Burns had the duty to bargain with the union with which Wackenhut had had a collective bargaining agreement but that it (Burns) was not bound by the terms of the contract. That holding appears to have been based on finding Burns the successor to Wackenhut as a result of employing a majority of Wackenhut employees. In the case at bar Boeing did not meet that standard of successorship and this Court holds therefore that it was not a successor to TWA.

That holding does not put to rest all remaining issues in the case. In their counterclaim the defendants sought to have Boeing turn over to them dues deductions now being withheld and escrowed by Boeing.

Boeing on March 19, 1971 advised IAM that it would make payroll deductions for union dues and initiation fees under the nation-wide agreement between Boeing and IAM. Thereafter, on April 8, 1971, IAM wrote to Boeing that without prejudice to IAM's position as to Boeing's obligation to perform under the TWA-IAM agreement, IAM members performing installation support services for Boeing would utilize Local Lodge 2061 dues deduction authorization cards for check-offs in accordance with the Boeing-IAM agreement.

On May 3, 1971 Boeing advised IAM that it would deduct but put in escrow — rather than remit — union dues pursuant to an employee's individual authorization. Boeing takes the position that until IAM agrees that the Boeing-IAM agreement is the applicable collective bargaining agreement, it can not under the prohibition of Section 302 (c) of the Act make check-offs and pay over the sums

collected. Boeing points out the possibility that neither the TWA-IAM nor the Boeing-IAM agreement may be applicable and that it may be ultimately found that the support services employees are unrepresented.[4]

However, there is no evidence that anyone has challenged IAM as the collective bargaining agent for the Boeing support service employees—the whole dispute has centered around *which contract* was applicable. Under the circumstances Boeing should remit the withheld dues to Local Lodge 2061 and IAM and Lodge 2061 should provide Boeing with an agreement to indemnify and hold harmless Boeing for any losses it might sustain as a result of such payments to Lodge 2061. It is therefore,

ORDERED:

1. Plaintiff's Motion for Summary Judgment be and is hereby granted in that this Court finds that Boeing is not a successor and is not bound by the collective bargaining agreement between TWA and IAM;

2. Defendants' Motion for Summary Judgment on their prayer for an Order requiring arbitration be and is hereby denied;

3 Defendants' Motion for Summary Judgment on their prayer for remittance of dues withheld by Boeing and escrowed is granted and Boeing shall forthwith pay over to Local Lodge 2061 of IAM the dues previously withheld and escrowed for each of those support service employees who were members of IAM and had delivered to Boeing a written assignment as required by Section 302(c) of the Act. In addition, Boeing shall pay to Local Lodge 2061, 6% interest on each deduction from the day of deduction to the day of payment to the Lodge. IAM and Local 2061 shall deliver to Boeing simultaneously with the pay-

[4] IAM has offered to hold Boeing harmless for any liability it may incur as a result of paying over the deductions made pursuant to the Boeing-IAM agreement.

ments aforesaid, a hold harmless and indemnity agreement, wherein each of said entities—IAM and Local Lodge 2061 —agrees to indemnify and hold Boeing harmless from any losses by Boeing because of the payment to Lodge 2061 of the escrowed dues arising from a final finding that IAM was not the collective bargaining agent for the employee from whom such dues were collected.

DONE and ORDERED in Chambers at Orlando, Florida, this 16th day of October, 1972.

/s/ GEORGE C. YOUNG
George C. Young
United States District Judge